2001

Tom Snyder v. Murray City Corporation, H. Craig Hall : Brief of Appellee

Utah Supreme Court

Brian M. Barnard, James L. Harris, Jr.; Attorneys for Appellant.
Richard A. Van Wagoner; Allan L. Larson; Snow, Christensen & Martineau; Attorney for Appellees.

IN THE UTAH SUPREME COURT

TOM SNYDER,

Plaintiff/Appellant,

vs.

MURRAY CITY CORPORATION, a municipal corporation and H. CRAIG HALL, City Attorney,

Defendants/Appellees.

Case No. 20010203-SC

(Oral Argument Requested)

AN APPEAL FROM SUMMARY JUDGMENT
ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
Honorable Stephen L. Henriod Presiding
(Trial Court Case No. 99-090-7806 CV)

BRIEF OF APPELLEES

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I. ORAL ARGUMENT REQUESTED

Appellees request oral argument because of important and novel state constitutional issues this appeal implicates.

II. LIST OF PARTIES IN THE COURT BELOW

John Thomas Snyder, Plaintiff and Appellant, represented by Brian M. Barnard and James L. Harris, Jr. of the Utah Legal Clinic.

Murray City Corporation, a municipal corporation, and H. Craig Hall, former City Attorney for the City (collectively referred to as the "City"), represented by Richard A. Van Wagoner and Allan L. Larson of Snow, Christensen & Martineau.

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V. STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (2001), and Rules 3 and 4, Utah Rules of Appellate Procedure.

VI. ISSUES PRESENTED FOR REVIEW

A. Did the trial court properly dismiss Mr. Snyder's Article I, Section 15 Speech Clause claim as time-barred under the applicable statute of limitations? Did Mr. Snyder waive an "ongoing violation" defense to the motion to dismiss the Speech Clause claim as time-barred? The issue was raised and preserved at R. 492 at 10, 20.

B. Is Mr. Snyder barred from relitigating claims and issues finally resolved in the federal case as to which the facts and legal standards are the same under the Utah Constitution? This issue was preserved at R. 251-58.

C. After Mr. Snyder announced his intent to give a "prayer" that was meant to offend, embarrass, disparage, and proselytize in a manner strictly incompatible with the purpose for having an Opening Ceremony at Council Meetings, did the City's decision not to invite Mr. Snyder to give the "prayer" during the Opening Ceremony, but suggestion that he give his "prayer" as an agenda item or during the Public Comment portion of the Meeting, violate any of the following provisions of the Utah Constitution:

1. Article I, Section 4 (Free Exercise Clause);

2. Article I, Section 15 (Free Speech Clause);

3. Article I, Section 4 (Establishment Clause);

4. Article I, Section 7 (Due Process Clause)?

These issues were raised and preserved at R. 9-14, 107-18.

VII. DETERMINATIVE PROVISIONS

See Addendum at Tab 5.

VIII. STATEMENT OF THE CASE

The City has a longstanding custom to include an inspirational thought or message, which may include a prayer, as part of the Opening Ceremony in Council Meetings. The purposes of such messages is, among others, to promote civility, lofty thoughts and attention to the agenda items. Appellant Mr. Snyder requested he be allowed to present a "prayer" at an upcoming Council Meeting. Mr. Snyder included a copy of the statement he intended to present.

Because Mr. Snyder's proposed "prayer" did not conform to the purpose for having the Opening Ceremony, H. Craig Hall, then City Attorney, informed Mr. Snyder his proposed "prayer" was unacceptable for the Opening Ceremony but invited Mr. Snyder to present his statement in the Public Comment portion of the Meeting or as an agenda item. Mr. Snyder rejected this offer and filed a federal lawsuit in mid-1994. The district court granted defendants' Motion for Summary Judgment, *Snyder v. Murray City Corp.*, 902 F. Supp. 1444 (D. Utah 1995) *(Snyder I*, Addendum Tab 1), *reh'g denied,* 902

F. Supp. 1455 (D. Utah 1995) *(Snyder II*, Addendum Tab 2). Mr. Snyder appealed the matter to the Tenth Circuit Court of Appeals and the Tenth Circuit affirmed, *Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997) *(Snyder III*, Addendum Tab 3). Mr. Snyder's federal law claims were dismissed with prejudice, but his state law claims were reinstated and dismissed without prejudice on September 10, 1997. The appeal was later heard *en banc, Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir.), *cert. denied,* 526 U.S. 103 (1998) *(Snyder IV*, Addendum Tab 4), and the Tenth Circuit, again, affirmed. The Tenth Circuit Order to dismiss the state law claims with prejudice was remanded to the district court on October 27, 1998. In that case Mr. Snyder had not brought a Speech Clause claim under the United States or Utah Constitutions.

Mr. Snyder then filed this lawsuit on August 3, 1999, more than five years after the City had declined to invite Mr. Snyder to give his "prayer," in which he asserted the original state law claims and added a state Speech Clause claim. The parties moved the trial court for summary judgment. The City orally moved to dismiss Mr. Snyder's Speech Clause claim as time-barred. Following the hearing on the cross motions, the trial court granted the City's motion, and denied Mr. Snyder's motion. The trial court also dismissed the Speech Clause claim as time-barred. (Addendum Tab 6.) This timely appeal followed.

IX. STATEMENT OF RELEVANT FACTS

The Federal District Court for the District of Utah and the Tenth Circuit Court of Appeals each addressed this case twice. Both courts set forth a statement of undisputed facts. Appellees believe Mr. Snyder is not entitled to re-visit the factual underpinnings of his claims and is bound by the federal courts' conclusions. The original panel opinion succinctly provided:

> Since 1982, Murray City has opened its city council meetings with a reverence period, during which an invocation or devotion is presented. The reverence portion of the meetings is designed to encourage lofty thoughts, promote civility, and cause the participants to set aside other matters in order to focus on the topics to be addressed at the meeting. The city council extends invitations to speak during the reverence period to individuals representing a broad cross-section of religious faiths, and invocations or devotionals have been presented at the Murray City Council meetings by Christians, Navajos, Quakers and Zen Buddhists. One speaker simply requested a moment of silence. Mr. Snyder, who does not reside in Murray City, wrote to the City, advising of his interest in presenting a prayer at a council meeting. Mr. Snyder attached his two-page proposed "Opening Prayer" to the letter. Mr. Snyder's request was part of his personal campaign to stop prayers at public meetings, waged in response to a recent decision of the Supreme Court of Utah which upheld Salt Lake City's practice of opening public meetings with a prayer.
>
> Although Mr. Snyder was reared as a member of the Church of Jesus Christ of Latter-Day Saints, he is no longer a practicing member of that faith, or any other organized religion. He testified that he considers himself deeply religious, but is not yet sure what his beliefs are, and leans towards agnosticism. Mr. Snyder cites the Book of Mormon and the Gospel of St. Matthew as the religious bases for his prayer. He believes that prayer should be a private matter between an individual and his or her God, and that Jesus Christ opposed public prayers, including those before government meetings. Although Mr. Snyder testified at his deposition that he believes in God, he also testified that he questions God's existence.

> On behalf of Murray City, Mr. Hall responded to Mr. Snyder's request and informed him that his proposed prayer was unacceptable because it did not follow the guidelines for prayers which the City had previously provided to Mr. Snyder. Although the council had no formal, written policy, Mr. Snyder had been informed by letter prior to the submission of his proposed prayer that "the purpose of the 'prayer' is to allow individuals [the] opportunity to express thoughts, leave blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies." Mr. Snyder had also been advised that comments on City practices and policies could be made during city council meetings either by requesting a place on the meeting agenda or by speaking during the citizen comment portion of the meeting. The citizen comment portion of the meeting immediately follows the reverence portion.

Snyder III, 124 F.3d at 1351-52 (Addendum Tab 3).

Out of caution, Appellees set forth their Statement of Facts.

INSPIRATIONAL THOUGHTS AT THE BEGINNING OF COUNCIL MEETINGS

The City has a longstanding custom to include an inspirational thought or message, which may include a prayer, as part of the Opening Ceremony in Council Meetings. The City established this practice in 1982 when the Council form of government became effective, and has remained uninterrupted, with one exception.[1] (R. 341.) The City has not favored any particular religion or religion in general in scheduling participants.[2] (R. 340-41, 345-46, 349-50, 354, 356.) Rather, the City's policy has been to expect and

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[1]The City suspended its practice during the pendency of the appeal in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993), decided in December 1993. Murray City reinstituted the practice in January or February 1994. (R. 349.)

[2]The City's practice was the same as that in Salt Lake City, as characterized in *Society of Separationists v. Whitehead*, 870 P.2d at 918-19 & n.2 (Utah 1993).

encourage those persons giving commencement thoughts or prayers to promote civility, lofty thoughts and attention to agenda items. (R. 340-41, 345-46, 349-50, 354, 356.) The City sought to assure a broad cross-section of the community was represented. It made a list of diverse congregations, groups and associations within the community and invited people from such groups to give a thought, expression or prayer at the commencement of Council Meetings. Participants have included Native Americans and representatives from Zen Buddhists, a cross section of Judeo-Christian congregations, Quakers, and others. (R. 340, 350-51.) Any public expenditures were not for the religious exercise itself, but for the meeting and that portion of the agenda that consists of opening thoughts, some of which have included prayers. (R. 340-41, 345-46, 349-50, 354.)

The City allows, as the first agenda item following the Opening Ceremony, three minutes each for citizens to express whatever political or other comments they have without restriction (Public Comment agenda item). Citizens may also contact the Council before-hand and be formally placed on the agenda in order to express personal or political views or grievances. (R. 343, 344, 357.)

MR. SNYDER'S REQUEST TO GIVE AN OPENING PRAYER

On December 10, 1993, this Court decided *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993) (hereinafter "*Whitehead*"), holding that Salt Lake City Council's policy of permitting prayer during the portion of Council Meetings set aside for

opening remarks did not violate the Utah Constitution's prohibitions against union of church and state or domination of government by any church.

On March 23, 1994, Mr. Snyder sent a letter to the City, expressing interest in presenting a "prayer" at the beginning of a Council Meeting. (R. 124.) Mr. Snyder was the first person ever to ask to offer a prayer before the City Council. Invitees gave all other inspirational messages or prayers. (R. 143, 151.) Mr. Snyder sent a second letter dated May 9, 1994. (R. 126.)

By letter dated June 1, 1994, Mr. Hall responded to Mr. Snyder's letters as follows:

> The Municipal Council has not established formal policies regarding the nature and/or content of this reverence portion of their agenda[3]. . . .
>
> The purpose of the "prayer" is to allow individuals that opportunity to express thoughts, leave blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies.
>
> Comments on present city practices or policies may be made at city council meetings by one of two methods; either by requesting to be placed on the agenda; or, taking up to three minutes during the "citizen comment" portion of the meeting. The later method requires no prior arrangements to be made.

(R. at 21.)

In a June 9, 1994 letter, Mr. Snyder requested he be allowed to give a "prayer" at the next available Council Meeting, and enclosed a copy of his proposal, as follows:

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[3]At the time *Whitehead* was initiated, Salt Lake City's policy had not been reduced to writing. 870 P.2d at 918-19 n.2.

OUR MOTHER, WHO ART IN HEAVEN (IF, INDEED THERE IS A HEAVEN AND IF THERE IS A GOD THAT TAKES A WOMAN'S FORM) HALLOWED BE THEY NAME, WE ASK FOR THY BLESSING FOR AND GUIDANCE OF THOSE THAT WILL PARTICIPATE IN THIS MEETING AND FOR THOSE MORTALS THAT GOVERN THE STATE OF UTAH;

WE FERVENTLY ASK THAT YOU GUIDE THE LEADERS OF THIS CITY, SALT LAKE COUNTY AND THE STATE OF UTAH SO THAT THEY MAY SEE THE WISDOM OF SEPARATING CHURCH AND STATE AND SO THAT THEY WILL NEVER AGAIN PERFORM DEMEANING RELIGIOUS CEREMONIES AS PART OF OFFICIAL GOVERNMENT FUNCTIONS;

WE PRAY THAT YOU PREVENT SELF-RIGHTEOUS POLITICIANS FROM MIS-USING THE NAME OF GOD IN CONDUCTING GOVERNMENT MEETINGS; AND, THAT YOU LEAD THEM AWAY FROM THE HYPOCRITICAL AND BLASPHEMOUS DECEPTION OF THE PUBLIC, ATTEMPTING TO MAKE THE PEOPLE BELIEVE THAT BUREAUCRATS' DECISIONS AND ACTIONS HAVE THY STAMP OF APPROVAL IF PRAYERS ARE OFFERED AT THE BEGINNING OF GOVERNMENT MEETINGS;

WE ASK THAT YOU GRANT UTAH'S LEADERS AND POLITICIANS ENOUGH COURAGE AND DISCERNMENT TO UNDERSTAND THAT RELIGION IS A PRIVATE MATTER BETWEEN EVERY INDIVIDUAL AND HIS OR HER DEITY; WE BESEECH THEE TO EDUCATE GOVERNMENT LEADERS THAT RELIGIOUS BELIEFS SHOULD NOT BE BROADCAST AND REVEALED FOR THE PURPOSE OF IMPRESSING OTHERS; WE PRAY THAT YOU STRIKE DOWN THOSE THAT MIS-USE YOUR NAME AND THOSE THAT CHEAPEN THE INSTITUTION OF PRAYER BY USING IT FOR THEIR OWN SELFISH POLITICAL GAINS;

WE ASK THAT THE PEOPLE OF UTAH WILL SOME DAY LEARN THE WISDOM OF THE SEPARATION OF CHURCH AND STATE; WE ASK THAT YOU WILL TEACH THE PEOPLE OF UTAH THAT GOVERNMENT SHOULD NOT PARTICIPATE IN RELIGION; WE

> PRAY THAT YOU SMITE THOSE GOVERNMENT OFFICIALS THAT WOULD ATTEMPT TO CENSOR OR CONTROL PRAYERS MADE BY ANYONE TO YOU OR TO ANY OTHER OF OUR GODS;
>
> WE ASK THAT YOU DELIVER US FROM THE EVIL OF FORCED RELIGIOUS WORSHIP NOW SOUGHT TO BE IMPOSED UPON THE PEOPLE OF THE STATE OF UTAH BY THE ACTIONS OF MIS-GUIDED, WEAK AND STUPID POLITICIANS, WHO ABUSE POWER IN THEIR OWN SELF-RIGHTEOUSNESS;
>
> ALL OF THIS WE ASK IN THY NAME AND IN THE NAME OF THY SON (IF IN FACT YOU HAD A SON THAT VISITED EARTH) FOR THE ETERNAL BETTERMENT OF ALL OF US WHO POPULATE THE GREAT STATE OF UTAH.
>
> AMEN.

(R. 130, 131.)

Prior to Mr. Snyder's proposal, no one had ever used the opening portion of the Meeting to attack City policies or practices or express political views. (R. 340, 342, 344, 355.) In a June 30, 1994 letter, Mr. Hall, on behalf of the City, stated:

> The text of the proposed prayer is unacceptable. It does not follow the guidelines set forth in my letter dated June 1, 1994. Until your proposed prayer satisfies these guidelines, an invitation to participate in our opening ceremonies will not be forthcoming. . . .
>
> If you have any questions please contact me directly. I would appreciate a phone number that I may discuss this matter with you during the day.

(R. 134.)

Whether the "prayer" reflected Mr. Snyder's deeply held or sincere religious beliefs had nothing to do with the City's decision. Rather, the decision was based on the

City's right to conduct its business in accordance with procedures it adopts, by practice and by rule. (R. 345.) Mr. Hall determined the text of the "prayer" did not encourage people to have lofty thoughts, did not encourage people to be civil, did not encourage people to "clear out the clutter of the day" or to focus on the agenda. Mr. Hall also believed it was insincere and hypocritical. (R. 345-46, 348, 353, 354, 356.)

According to the City's custom and practice, any person or group could give the inspirational thought or invocation, be they agnostics, Catholics, Buddhists, Baptists, Seventh Day Adventists or others, so long as the offering was consistent with the purpose for having the Opening Ceremony. (R. 349-50, 352, 258.)

Mr. Snyder did not accept Mr. Hall's invitation to give his statement as an agenda item or during the Public Comment portion of the Meeting. Nor did he accept Mr. Hall's invitation to discuss the matter or to provide Mr. Hall a telephone number where he could be reached. (R. 347-48, 357, 386-389.)

MR. SNYDER'S RELIGIOUS BELIEFS

Mr. Snyder was baptized LDS, and has "the dubious distinction of having served in the same Deacon's Quorum with now-Apostle Dallin Harris Oaks" in Vernal. He resigned from the LDS Church because of its stand on the Equal Rights Amendment. He is not a member of any other church, and has not been in any church for several years. (R. 363-64.) He has been trying for years to "separate the dogmatisms that [his] hard-

core little Mormon mother painted on [him] by the time [he] was thirteen or fourteen years old." He thinks he is deeply religious, but he is not sure what his beliefs are. He believes in doing unto others as he would have them do unto him, but he "can't separate [his] political and philosophical and religious beliefs. They are pretty tangled up." Snyder Depo., p. 15 (R. 365).

He supposes he believes in God. At the time of his deposition in September 1994, his odds were 60/40 against God's existence. Some days he is more or less pessimistic. (R.366, 400-01.) To the extent he believes God exists, he does not know whether God looks like a man or a woman, nor what manifestation, if any, God takes. However, he has some beliefs learned from his mother which sometimes "rare up," but he does not know what those beliefs are, although he does recall that his mother taught him God was male. (R. 366-67.) He does not know what he believes about God's powers, or whether God can grant requests. (R. 367-68.)

When asked whether he had ever had a vision or "spiritual experience," his only response was to describe an incident about ten years before in Vernal when his friend, who was a "bad drunk," told him about a visit from the Lord. It went something like this:

Drunk: I had a visit from the Lord, and boy, was I surprised!

Snyder: Well, what surprised you?

Drunk: She's black! (spilling a drink on Mr. Snyder).

Mr. Snyder "went crazy." "[He] thought that was so funny." (R. 368-69.)

THE ORIGIN AND MOTIVATION OF MR. SNYDER'S "PRAYER"

Mr. Snyder's son-in-law is acquainted with Chris Allen and Rich Andrews, who Mr. Snyder thinks co-chaired the Society of Separationists. (R. 373-74.)[4] Mr. Snyder read newspaper accounts of *Whitehead* in December 1993. After the first of the year Mr. Snyder wrote a letter to Mr. Andrews saying he was sorry the Court had ruled against them. In the letter, he incorporated a draft of his "prayer." Mr. Snyder described the genesis of, and the *motivation* for, the "prayer":

> I get rid of my frustrations with a pencil and a piece of paper. The letter I wrote him was tongue-in-cheek. The first part of it was . . . As I was venting my frustrations in that letter . . . I told Rich I had watched so much football over the holidays that I had a trick knee and I was laying on the couch convalescing, licking my nuts and listening to the Mormon Tabernacle Choir sing "When the Saints Come Marching In." As I remember, that's the way it all started. *And then I said, if you need, or if they are going to force us to listen to their prayers, let's give them a prayer that they don't want to listen to. I think that is basically what I said.*

(R. 375-77 (emphasis supplied).)

The prayer was intended to "jolt Murray or Salt Lake City, make them think that they really didn't want to open up that can of worms again." (R. 377-78.)

Mr. Snyder does not live in the City, had never been to a Council Meeting in his life, and could not conceive of any business he would have had before the City Council

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[4]Richard Andrews is a named plaintiff in *Whitehead*, 870 P.2d 916 (Utah 1993).

during 1994. (R. 371, 372-73.) His motivation was to accomplish the same thing he had accomplished with Salt Lake City.[5] Chris Allen of the Separationists suggested with that "victory" under their belts, Mr. Snyder do the same thing with other cities. (R. 378, 379-82, 383-84.)

> Q. As I get it, what you wanted to have happen here was to have Murray City do the same thing that Salt Lake City did, right? Just decide not have prayers?
>
> A. I would have been pleased with that, yes sir.

(R. 395-96.)

> Q. And the primary purpose of the prayer, as I get it, was to call attention, to the City Council, to your aversion to prayer and to get them thinking about the whole issue; is that right?
>
> A. To make them see the fallacy of what they are getting into by prayer.

(R. 399.)

He did not want to give the "prayer" during the Public Comment portion of the Meeting solely because he assumed he would be interrupted; admittedly, however, he had never been to a Council Meeting, and did not know what the practice was concerning interrupting people. (R. 385-86.) He wanted the Council to be his captive audience for three minutes so he could leave the thought and make them reconsider the practice. (R.

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[5]When he requested permission to give his "prayer" at a Salt Lake City Council Meeting in January 1994, the Council decided, rather than be subjected to such "a can of worms," it would forego the practice of prayer altogether.

385-86.) He "expected somewhat of a stunned silence where they could meditate, gather their thoughts, and start the ball rolling. Let's debate [the issue of prayer]." (R. 393.)

If the City had invited him to give his "prayer," but had not modified its practices to Mr. Snyder's approval, he would have written another "prayer," perhaps more offensive, in order to get the Council's attention:

> Q. So your purpose was to do whatever it takes to get their attention; correct?
>
> A. As I have said, you've got to have their attention before their thought process looks at themselves.
>
> Q. And your goal is to get their attention, have them see the light, have them cease allowing prayer at the commencement of council meetings. That's your goal. Correct?
>
> A. As I have said, I have - I don't like public prayer. I don't think it is proper. I disagree with the Utah Supreme Court. But I have the right to express my thoughts and opinions, and I'm going to fight to protect those rights.
>
> Q. You consider that you have a right to give your prayer at the prayer portion of the City Council meeting, no matter what the content, or the intent, of your prayer? That's your position in this matter?
>
> A. Yes. I have a right to deliver it.

(R. 396-98.)

Apparently acknowledging the intemperate nature of his requests in his "prayer," he attempted to define some terms:

> But let me define "strike down" and "smite." When I use the term "strike down," I would - my prayer to her would be to knock them off of their little self-styled pedestals and put them on a level playing field to - I think I'd know the true definition of "smite" because after being married to that old gal, living with her for over forty years, have her sneak off like she did, I God damn sure know what smitten is. And it took me a while to realize, after a few bottles of scotch and beating my head against the wall, I realized I was hurt. She hurt me. She smited me terribly. And that was the intent of "strike down" and "smite."[6]

(R. 394-95.)

He refused Mr. Hall's offer to discuss the issue as set forth in Mr. Hall's letter of June 30, 1994, and immediately filed suit in the related federal case. (R. 134.)

X. SUMMARY OF THE ARGUMENT

Mr. Snyder filed suit in federal court, asserting violations of both the United States and the Utah Constitutions under identical facts. The federal courts' decisions bear directly on this case and, in instances where the legal standards under the respective constitutions are the same, the decisions are dispositive.[7]

In sum, (1)(a) the City had no affirmative duty under Article I, § 4 of the Utah Constitution to provide Mr. Snyder a forum in which to exercise his religion because the language *vis-a-vis* the government is proscriptive not prescriptive; (b) Mr. Snyder did not

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[6]There is, of course, no evidence anyone associated with the City knew of Mr. Snyder's marital history, drinking habits, or his personal definition of "strike down" or "smite."

[7]The language in the respective Constitutions is essentially identical with respect to Mr. Snyder's Free Exercise claim, his Speech claim and his Due Process claim.

have a deeply held or sincere religious belief in the practice he sought to exercise, so the City did not interfere with a religious exercise; (2)(a) his Speech Clause claim was properly dismissed as time-barred; (b) Mr. Snyder's claim of an "ongoing violation" as a defense to the statute of limitations motion is procedurally improper because it is raised for the first time on appeal; (c) the forum to which he sought access--Opening Ceremony--was non-public, reserved for specific government purposes, and, because his "prayer" was strictly incompatible with the purpose for having legislative prayer, the City properly chose not to invite Mr. Snyder to give the "prayer"; (d) had the City invited Mr. Snyder to give his "prayer" during the Opening Ceremony, the City would have risked (i) violating the Establishment provisions of Article I, Section 15 because of the "prayer's" overt proselytization ("compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech"), (ii) violating the federal Establishment Clause, or (iii) changing the nature of the forum, which it was not required to do; (e) Mr. Snyder had reasonable alternatives to convey his message to the Council; (3) the City did not violate the Establishment provisions of Article I, § 4 by declining to invite Mr. Snyder to give his "prayer" because his proposal was strictly incompatible with the purpose for having legislative prayer, yet he or anyone else who would give a message that was consistent with the purpose for having the Opening Ceremony was and is welcome; (4) the City did not deny Mr. Snyder due process within the meaning of

Article I, § 7 because (a) he was not deprived of life, liberty or property, (b) he was afforded reasonable, meaningful process which he declined.

The narrow question is whether the City's decision not to invite Mr. Snyder to give his "prayer" during the Opening Ceremony of the Meeting (a forum specifically reserved for government purposes) after he announced his intent to proselytize, embarrass, and disparage the beliefs of others, but offer of time during another part of the Meeting to express his views, is constitutionally permitted. The broader issue, however, is whether, by having legislative prayer during the Opening Ceremony, the City must provide a pulpit during the Opening Ceremony to anyone who claims a sincerely held religious belief in something, regardless of message's strict incompatibility with the City's purpose for having legislative prayer. Mr. Snyder argues Murray City opened Pandora's Box by having the ceremony, and now must allow every "exercise" even the most imaginative mind could conceivably call "religious," regardless of its inconsistency with the City's lawful purpose in reserving the forum. The City believes Mr. Snyder's assertion is not a valid extension or application of *Whitehead.*

The City did not open Pandora's Box. The Utah Constitution permits and requires courts to draw reasonable lines, to distinguish legitimate legislative prayer from gratuitous insult in a non-public forum. The City did not have to tolerate Mr. Snyder's offering as the event itself; its accommodation to hear his protest as a separate agenda

item or during the Public Comment portion of the Meeting was fair, reasonable and constitutional. Forcing the City to allow Mr. Snyder to inflict whatever "prayer" he wants as the "putative government-sanctioned speaker" in the non-public forum would create a serious imbalance of individual over majority rights and interests.

XI. ARGUMENT

A. RES JUDICATA AND COLLATERAL ESTOPPEL.

Certain claims and issues herein were litigated in federal court. To the extent those claims and issues and the legal standards are the same, the parties are bound by the courts' rulings.

1. LEGAL STANDARD.

Under Utah law, the doctrine of *res judicata* has two distinct branches. Both branches are designed to protect litigants from the burden of relitigating decided issues, and promote judicial economy by preventing needless litigation. *Macris & Associates, Inc. v. Neways, Inc.,* 16 P. 3d 1214, 1219 (Utah 2000). One branch, claim preclusion, bars relitigation of claims previously litigated between the same parties. *Id.* The other branch, issue preclusion (interchangeably referred to as collateral estoppel), prevents relitigation of previously litigated issues. *Id.*

A "claim" is a set of operative facts giving rise to a judicially enforceable right. *Swainston v. Intermountain Health Care*, 766 P.2d 1059 (Utah 1988) (citing *Original*

Ballet Russe v. Ballet Theatre, 133 F.2d 187 (2d Cir. 1943)). This Court has held that in order for claim preclusion to bar a subsequent cause of action, the plaintiff must satisfy three requirements:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214, 1219 (Utah 2000) (quoting *Madsen v. Borthick,* 769 P.2d 245, 247 (Utah 1988)). All three elements must be present for claim preclusion to apply. *Id.*

An "issue" is a material point asserted by one party and denied by the other. *Id.* (citing *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943)). As noted in *Hill v. Seattle First National Bank*, 827 P.2d 241, 245 (Utah 1992), this Court has adopted a four-prong test governing the application of issue preclusion:

> First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.

827 P.2d 241, 245 (Utah 1992).[8]

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[8]Utah cases inconsistently apply an additional requirement that the issue actually litigated in the earlier matter "must have been essential to the resolution of that suit." *Compare Bruno*, 735 P.2d 387 (citing *Robertson v. Campbell*, 674 P.2d 1226, 1230 n.1 (Utah 1983), for additional requirement) *with Swainston*, 766 P.2d 1059 (making no mention of requirement that issue be essential in previous matter) *and Burnett*, 797 P.2d

The City has been unable to find a Utah case expressly addressing the question whether claim or issue preclusion serves to prevent relitigation in Utah state courts of civil claims or issues previously decided in federal courts or other state's courts.[9] However, this Court, at least twice, affirmed lower court decisions invoking the doctrine of collateral estoppel to bar litigation of issues in state court that were previously decided in federal court. *See Hill v. Seattle First National Bank*, 827 P.2d 241 (Utah 1992); *Burnett v. Utah Power & Light Co.*, 797 P.2d 1096. This Court also considered a case relying on collateral estoppel to prevent relitigation of issues previously decided in bankruptcy court, and applied the same four-prong test used in other cases. *See Bruno*, 735 P.2d 387. Finally, in *Glick v. Holden*, 889 P.2d 1389 (Ut. Ct. App. 1995), the Court of Appeals was confronted with whether a federal judge's adoption of a Magistrate Judge's Report and Recommendation dismissing certain claims as legally frivolous under 28 U.S.C. § 1915(d), precluded relitigation of those claims in state court. The Court decided the case on an alternative basis, and therefore did not reach that issue. But for the

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1096 (Utah 1990) (similarly quiet as to requirement that issue be essential). This additional requirement is arguably consumed, at least in part, under the third prong of the original test which mandates a full and competent consideration of any issue precluded from relitigation.

[9]Utah courts have noted the doctrine of "dual sovereignty" prevents invocation of collateral estoppel to prevent relitigation of issues by separate sovereigns in *criminal* cases. *See, e.g., Utah v. Byrns*, 911 P.2d 981 (Utah App. 1995) (relying on several federal decisions).

alternative ground for dismissal, the Court appeared ready to apply claim preclusion analysis to the issue. *Id.* at 1391-92. Consequently, even though no Utah court has expressly held such, the doctrine of res judicata is applied to claims and issues decided in federal courts. This approach addresses the efficiency rationale underlying the rule, which should apply with equal force to issues or claims fully considered and decided by any competent state or federal court.

2. PRIOR LITIGATION OF CLAIMS AND ISSUES.

Mr. Snyder is barred from relitigating several claims and issues that respectively meet the three criteria for claim preclusion and the four criteria for issue preclusion. In *Snyder I*, 902 F. Supp. 1444 (D. Utah 1995) (Addendum at Tabs 1 and 2), under identical facts, plaintiff made the same claims and raised the same issues under the United States Constitution and the Utah Constitution (with the exception of the Speech Clause claim).[10] In *Snyder III*, 124 F.3d 1349 (10th Cir. 1997) (Addendum at Tab 3), the Tenth Circuit affirmed the dismissal of Mr. Snyder's federal claims. Concerning Mr. Snyder's Free Exercise claim, the Tenth Circuit explained:

> Even assuming that Mr. Snyder is possessed of sincerely held religious beliefs, as articulated in his proposed prayer, we find that Mr. Snyder's claim is not

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[10]Moreover, in *Vagi Convalescent & Care Inst. v. Industrial Comm'n*, 649 P.2d 33 (Utah 1982), this Court concluded that decisions relating to the Fifth and Fourteenth Amendments to the United States Constitution are highly persuasive when interpreting the Due Process Clause of the Utah Constitution.

> cognizable under the Free Exercise Clause. In fact, Mr. Snyder's arguments evince a fundamental misconception about the rights bestowed by the clause.[11]
>
> The Free Exercise Clause is one of the Bill of Right's "thou shall not" prohibitions against certain government actions. The Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government. . . . To protect "the right to believe and profess whatever religious doctrine one desires," . . . the Free Exercise Clause prohibits the government from impermissibly burdening an individual's free exercise of religion. However, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."
>
> The Free Exercise Clause does not guarantee any person the right to pray whenever and wherever he chooses. Nor does the Clause guarantee a person the right to speak during portions of public meetings set aside for devotional or invocational purposes. Suggestion to the contrary is inconsistent with both common sense and constitutional doctrine. . . . We find no violation of the Free Exercise Clause.

Id. at 1353 (citations omitted (Addendum at Tab 3)).

The Tenth Circuit also affirmed the district court's dismissal of Mr. Snyder's due process claims. *Id.* at 1353-54 (Addendum at Tab 3). The court explained:

> Because Mr. Snyder's First Amendment claims are without merit, his claim under the federal Due Process Clause also fails. It is beyond argument that process is

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[11]The court explained:

> This may well be, however, one of those very rare cases in which the plaintiff's beliefs are "so bizarre, so clearly nonreligious in motivation" that they are not entitled to First Amendment Protection. . . . Regardless, we need not decide whether Mr. Snyder's beliefs are religious in nature nor whether they are sincerely held.

Snyder III, 124 F.3d at 1353 (Addendum at Tab 3).

> due only when the government terminates a protected interest. . . . Mr. Snyder was not deprived of any protected interest and therefore he had no entitlement to any sort of process.

Id. at 1354 (citations omitted)(Addendum at Tab 3).

However, the Tenth Circuit granted a rehearing *en banc* solely on the dismissal of the Establishment Clause claim. The court again affirmed the district court. The court first explained the unusual posture in which this case is presented:

> Although there are many kinds of Establishment Clause claims, the prayer cases typically arise in a procedural posture that pits an audience member of a particular faith, often a minority religious view, against a government-sanctioned speaker who has recited a prayer, often expressing a majoritarian religious view, during a government-created prayer opportunity. . . .
>
> The difficulty of the establishment claim in this case flows partly from its inversion of the usual posture. Here, the plaintiff is the putative *government-sanctioned speaker*, and he alleges that in preventing him from reciting his prayer against government prayers, the government has established a religion. Despite its unusual posture, the essence of Snyder's contention is straightforward: Snyder claims that in branding his particular prayer "unacceptable" and preventing him from offering it as part of the official "reverence period" of the municipal council meeting, Murray City has impermissibly preferred one religion over another. We must decide if this is so.

Snyder IV, 159 F.3d 1227, 1231 (10th Cir. 1998) (emphasis supplied) (Addendum at Tab 4).

Explaining the backdrop for and standard against which the federal constitutionality of legislative prayer is measured, the court stated:

> The point at which an invocational legislative prayer falls outside the traditions of the genre and becomes intolerable occurs when "the prayer opportunity has been

> exploited to proselytize or advance any one, or to disparage any other, faith or belief." . . . Thus, the kind of legislative prayer that will run afoul of the [United States] Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine. When a legislative invocation strays across this line of proselytization or disparagement, the Establishment Clause condemns it.
>
> As a second constitutional restriction on legislative prayer, the Court in *Marsh* also warned that the selection of the person who is to recite the legislative body's invocational prayer might itself violate the Establishment Clause if the selection "stemmed from an impermissible motive." . . . The [United States Supreme] Court implicitly indicated that the particular motive that is "impermissible" in this context is a motive in selecting the prayer-giver either to "proselytize" a particular faith or to "disparage" another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body.

Id. at 1233-34 (citations omitted) (Addendum at Tab 4).

Comparing Mr. Snyder's prayer with the foregoing standards, the court had no difficulty rejecting his federal Establishment claim and, in fact, stating that permitting the "prayer" would have run afoul of the federal Establishment Clause:

> Snyder's claim must fail as a matter of law because his proposed prayer falls well outside the genre of legislative prayers that the Supreme Court approved in *Marsh* and the record is devoid of evidence indicating an intent to promote or disparage any religion. Not only does Snyder's prayer explicitly attack the genre itself, it also disparages those who believe that legislative prayer is appropriate. . . . Most importantly, Snyder's prayer aggressively proselytizes for his particular religious views. . . . Snyder's prayer clearly draws from the tenets of his belief--which is an aspect of many different religious faiths--that prayer should only be conducted in private. Because Snyder's prayer seeks to convert his audience to his belief in the sacrilegious nature of governmental prayer, his prayer is itself proselytizing. As a result, Murray City was well within its rights under Marsh to deny permission for Snyder to recite his proposed prayer. A deliberative body has a right to take steps

to avoid the kind of government prayer that would run afoul of *Marsh* and the Establishment Clause.[12]

Id. at 1235 (Addendum at Tab 4).

In his original suit, Mr. Snyder made no Speech Clause claim under state or federal law, but under the doctrine of claim preclusion, that was a claim he could and should have brought.

B. PLAINTIFF'S FREE EXERCISE CLAIM FAILS.

The "Religious Liberty" Clause in the Utah Constitution provides in part: "The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;" Utah Const. Art. 1, § 4.

1. THE CITY HAD NO AFFIRMATIVE DUTY TO PROVIDE MR. SNYDER A FORUM IN WHICH TO EXERCISE HIS RELIGION.

Utah's "free exercise" language is identical to that in the First Amendment to the United States Constitution. The Tenth Circuit properly characterized and dispensed with Mr. Snyder's Free Exercise claim, quoted above.

See 124 F.3d at 1353 (Addendum at Tab. 4).

The City was fully within its legal prerogative to ask that Mr. Snyder wait a few minutes to give it. See Utah Constitution, Article XI; Utah Code Ann. § 10-3-501 et.

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[12]Thus, were the Utah Constitution interpreted to require the City to allow Mr. Snyder to give his "prayer" during the Opening Ceremony, that interpretation would result in a violation of the federal Establishment Clause.

seq.; *id.* § 10-3-601 et. seq. The Council has the right to carry out its legislative responsibilities in an orderly, civilized fashion. An individual's involvement in a Council Meeting is reasonably subject to rules of order and civility. An individual's religious beliefs do not excuse him from compliance with otherwise valid laws, rules or regulations. As the United States Supreme Court explained:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

In *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), the Court further explained:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . .
>
> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . . . "Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land and in effect to permit every citizen to become a law unto himself."
>
> [T]he right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the

ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."

Id. at 878-89.

Mr. Snyder, along with any other public members who wished to criticize or comment on the City's policies, could reasonably be required to speak during the Public Comment portion of the Meeting or be placed on the agenda, consistent with the Council's rules of order. Asking that modest civility of Mr. Snyder hardly interfered with his right of religious exercise.

2. MR. SNYDER DOES NOT HAVE A DEEPLY HELD RELIGIOUS BELIEF IN THE PRACTICE HE SOUGHT TO EXERCISE.

The "prayer" was manifestly insincere as a religious exercise as Mr. Snyder testified: "As I have said, I have--I don't like public prayer. I don't think it is proper." (R. 396-98). Presumably, before one's "religious exercise" is entitled to constitutional protection, it must be real, that is it must be deeply or sincerely held. Mr. Snyder claims his "religious belief" is prayers *never* be given at Council Meetings. The City agrees that is his deeply held belief. However, he sought to give a "prayer" as a form of purported "religious expression," before the Council, a practice in direct conflict with his sincerely held belief. By Mr. Snyder's own admission, the City did not burden a practice in which he had a sincerely held religious belief. By his own admission, Mr. Snyder's claim of

burden is insincere on its face. There was no violation of Mr. Snyder's right to the free exercise of his religion.

Moreover, it was not an integral part of Mr. Snyder's "deeply held" or "sincere" religious belief that his statement be given only during the Opening Ceremony portion of the Meeting. The undisputed facts establish Mr. Snyder had no sincerely or deeply held religious belief concerning precise timing of when he must utter the words. He wanted a captive audience before the Council, and he could have had it, without restriction, by being placed on the agenda or speaking during the Public Comment portion of the Meeting. His *only* reason for not exercising his so-called religious expression as an agenda item or during the Public Comment portion of the Meeting had nothing to do with a sincerely or deeply held religious belief. It was his unfounded fear of interruption. Hence, his exercise of religion was in no way inhibited.

C. PLAINTIFF'S SPEECH CLAIM FAILS.

1. THE TRIAL COURT PROPERLY DISMISSED THIS CLAIM AS TIME-BARRED, AND MR. SNYDER WAIVED ANY "ONGOING VIOLATION" ARGUMENT.

The court below properly dismissed Mr. Snyder's Speech claim as time-barred. Mr. Snyder contends that although the City rejected his "prayer" in 1994, its wrongdoing continues today. He characterizes his Speech claim as a challenge to the current policies and practices of the City. This Court may affirm the judgment appealed from 'if it is

sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action. . . .'" *Dipoma v. McPhie*, 29 P.3d 1225 (2001) (quoting *Limb v. Federated Milk Producers Ass'n*, 461 P.2d 290, 293 n.2 (1969)). However, if "the ground or theory urged for the first time on appeal is not *apparent* on the record, the principle of affirming on any proper ground has no application." *State v. Montoya*, 937 P.2d 145, 149 (Ct. App. Ut. 1997) (emphasis supplied). "Apparent on the record, in this context, means more than mere assumption or absence of evidence contrary to the 'new' ground or theory. The record must contain sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal." *Id.*

Mr. Snyder failed to raise this argument in the court below, and his new argument for preserving the claim is not "apparent on the record." The argument does not appear in the trial Court's decision. Until Mr. Snyder filed his opening brief, the City did not know, and did not have any reason to know, that Mr. Snyder intended to rely upon this argument in an attempt to circumvent the obvious statute of limitations problem. Even if this Court overlooks Mr. Snyder's failure to preserve this issue for appeal, Mr. Snyder's argument is flawed for two reasons.[13]

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[13]Although the trial court dismissed the Speech claim under a five year statute of limitations in its Memorandum Decision, the court was probably referring to the four

First, it was a claim he could and should have brought within the meaning of the doctrine of res judicata.

Second, Mr. Snyder lacks standing to bring a Speech claim challenging the City's current policies and practices. Utah's "generally stated standing rule is that a plaintiff must have suffered 'some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute.' The need for such a personal stake frequently is described as a requirement that the plaintiff's injury be 'particularized.'" *Soc'y of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1170 (Utah 1987) (internal citations omitted). The City has not restricted Mr. Snyder's speech in any way, and in particular, since 1994 and, therefore, Mr Snyder does not currently have a "distinct and palpable injury." It is insufficient that Mr. Snyder disagrees with the City's current policies and procedures. Presently, Mr Snyder does not have an injury that is "particularized" and therefore lacks standing to bring a Speech claim.

2. THE OPENING CEREMONY IS A NONPUBLIC FORUM PROPERLY LIMITED BY A REASONABLE AND VIEWPOINT-NEUTRAL RESTRICTION ALLOWING ONLY LEGISLATIVE PRAYERS.

Section 15 of Article I, Utah Constitution, provides: "No law shall be passed to abridge or restrain the freedom of speech or of the press." This language is nearly

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year "catch all" period for "relief not otherwise provided for by law" found at Utah Code Ann. § 78-12-15(3) (2001).

identical to that in the First Amendment to the United States Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." There is little Utah case law interpreting this provision, and the City has found no Utah case law giving guidance concerning the speech rights of persons to gain access to a portion of a meeting the government has specifically reserved for its own official purposes (non-public forum), vis., the Opening Ceremony. Because of the virtually identical language in the state and federal Speech Clauses, the City turns to federal case law, of which there is an abundance, for guidance.[14]

a. THE OPENING CEREMONY IS A NONPUBLIC FORUM, NOT A DESIGNATED OR A LIMITED PUBLIC FORUM.

Appellant contends that the Opening Ceremony constitutes a designated public forum.[15] Brief for Appellant, at 25-28. Citing as his sole authority a dissenting opinion

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[14]See *supra*, note 10.

[15]Appellant confuses the definitions of "designated public forum" and "limited public forum," and consequently does not take a clear position on whether the Opening Ceremony constitutes the former or the latter. *See* Brief for Appellant, at 28 ("The Opening Ceremony is a limited (or designated) public forum"). "[P]ublic property which the state has opened for use by the public as a place for expressive activity" is known as a "designated public forum," *see, e.g., Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983), not a "limited public forum," as Appellant states, *see* Brief for Appellant, at 24. A "limited public forum" is a designated public forum the access to which is limited by speaker identity or subject matter restrictions. *E.g., Good News Club v. Milford Cen. School*, 121 S.Ct. 2093, 2100 (2001) ("When the State establishes a limited public forum, [it] many be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics'") (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)); *see also Perry*, 460 U.S. at 46 n.47 ("A public forum

joined by only two of the thirteen judges in *Snyder IV*, 159 F.3d 1227, 1245-47 (10th Cir. 1999) (*en banc*), Appellant argues that the City's selection of a religiously diverse set of speakers to participate in the Opening Ceremony, together with an alleged lack of restrictions on the subject matter such speakers are to address, "created a public forum where people are allowed to express their ideas, religious and nonreligious." Brief for Appellant, at 28.

A designated public forum is "public property that the state has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). It is well established that government creates a designated public forum *"only* by *intentionally* opening a nontraditional forum for *public discourse*." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) (4-3 decision) (emphasis supplied), *quoted with approval in Arkansas Educ. Telev. Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). A designated public forum cannot be created by "inaction," by the government's merely "permitting limited discourse," or in

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may be created for limited purposes such as use by certain groups or for the discussion of certain subjects") (citations omitted).

Since Appellant argues only the constitutional test for restrictions on access to designated public forums, and nowhere suggests any limits on such access, *see* Brief for Appellant, at 27-28, Appellee has understood Appellant to be arguing only that the Opening Ceremony is a designated public forum.

the face of clear evidence of a contrary intent. *Cornelius*, 473 U.S. at 802, 803, *cited and quoted with approval in Arkansas Educ. Tel.*, 523 U.S. at 677.

The record is devoid of evidence that the City had any intention of converting the Opening Ceremony into a designated public forum open for the expression of any message whatsoever. To the contrary, the record shows that the City has consistently acted to reserve the Opening Ceremony exclusively for speech that constitutes "legislative prayer."

As the Tenth Circuit recognized in *en banc* proceedings relating to this case, "legislative prayer" is a "long-accepted genre" of expression "that seeks to bind peoples of varying faiths together in a common purpose," and "typically involves nonsectarian requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body." *Snyder IV*, 159 F.3d at 1234 & n.11 (citing and discussing *Marsh v. Chambers*, 463 U.S. 783 (1983)). This Court has recognized the same genre. *See Whitehead*, 870 P.2d 916, 930 (Utah 1993) (noting the "carefully ecumenical prayer practices" of the chaplain in *Marsh* and of the participants in the 1895 Utah Constitutional Convention).

Although the City had no written guidelines, the record clearly shows that the City intended that every participant in the Opening Ceremony give a message that fell within the genre of "legislative prayer," that it communicated this intent to every participant, and

that every participant understood this limitation and complied with it. Thus, it is not true, as Appellant argues, *see* Brief for Appellant, at 23-24, that the City had no policies or procedures in place prior to Appellant's request to participate in the Opening Ceremony, or that decisions relating to what kind of speech to permit in the Opening Ceremony were left to the sole discretion of Mr. Hall.

For example, the federal courts in prior proceedings in this case repeatedly found or affirmed the finding that the purpose of the Opening Ceremony was to "encourage lofty thoughts, pronounce blessings and set an inspirational tone for the meeting." *Snyder I*, 902 F. Supp. 1444, 1448 (D.Utah), *aff'd on rehearing, Snyder II*, 902 F. Supp. 1455, 1456 (D.Utah 1995) (Finding No. 3), *adopted on appeal, Snyder III*, 124 F.3d 1349, 1351 (10th Cir. 1997). Speakers invited to participate in the Opening Ceremony were asked in the written invitation "to give an 'invocation, appropriate message, or inspirational thought.'" *Snyder III*, 124 F.3d at 1357 (quoting from the record). Indeed, Appellant himself assumes that the purposes of the Opening Ceremony were to promote "high-mindedness," order," and "civility." *See* Brief for Appellant, at 27. Finally, Mr. Hall testified that since the Opening Ceremony began in 1982, "a custom and practice of 'positive, upbeat' prayers exhorting the City Council to do what they ought to do under their statutory responsibilities had developed." *Snyder III*, 124 F.3d at 1357.

The fact that the City has invited speakers who, as a group, represent "a broad cross-section of the community," see Brief for Appellant, at 27 (quoting *Snyder*, 159 F.3d at 1246-47 (dissenting opinion)), does not convert the Opening Ceremony into a designated public forum in which the general public is presumptively entitled to express any and all ideas. *See United States v. Grace*, 461 U.S. 171, 177 (1983) ("Publicly owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will"). Government is empowered to reserve property not constituting a public forum for the discussion of certain subject matters, even if it chooses not to restrict the identity of the speakers. *See Cornelius*, 473 U.S. at 806 ("[A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum"); *cf. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics"). Although the City has indeed indicated that any member of the general public may participate in the Opening Ceremony, it has consistently limited that participation to delivery of a message that falls within the genre of legislative prayer, and thus has not created a designated public forum.

b. THE CITY PROPERLY RESTRICTS ACCESS TO THE OPENING CEREMONY TO MEMBERS OF THE PUBLIC WHO DELIVER WHAT IS COMMONLY UNDERSTOOD TO BE A LEGISLATIVE PRAYER.

"Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." *Cornelius*, 473 U.S. at 806; *accord Perry*, 460 U.S. at 46 ("[T]he state may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"). Although subject-matter restrictions are necessarily content-based, they trigger strict scrutiny only if they discriminate on the basis of the speaker's viewpoint.

(1) Restricting Access to Members of the Public Willing to Deliver a Legislative Prayer Is Viewpoint Neutral.

Appellant argues that the policies articulated by Mr. Hall in response to Appellant's request were merely *post hoc* justifications intended specifically to exclude Plaintiff because of the religious viewpoints expressed in his proposed "prayer." Brief for Appellant, at 27-28. This contention is wrong.

Speakers may say whatever they wish, so long as what they say falls within the genre of legislative prayer. For example, a participant in the Opening Ceremony may

invoke religiously based blessings, such as asking for "the assistance of heaven," for strength to act according to "the faith and beliefs of our religions" and the "principles and directives that should guide us," or for divine "guidance" and "wisdom" in the face of the challenges of the day. *Snyder IV*, 159 F.3d at 1234 n.11 (giving examples of appropriate legislative prayers delivered by Benjamin Franklin at the 1787 Constitutional Convention and by the chaplain in *Marsh*). But a participant might also make nonreligious moral or secular exhortations, such as emphasizing the "common purposes" or "ties that bind us together, " *Snyder IV*, 159 F.3d at 1234 n.11, or asking that Council members remember their responsibility to act for the common good, to consider carefully the issues before them, and to seek just and proper resolutions of those issues. A participant might even ask merely for a moment of reflective silence, as indeed one participant has. *Snyder III*, 124 F.3d at 1351-57.

Appellant's proposed "prayer" fell well without the definitional boundaries of legislative prayer. It criticizes those who do not subscribe to Appellant's normative vision of the separation of church and state, and mocks those who support the very practice of legislative prayer. Rather than affirming our unity and common purposes as citizens, or encouraging the City Council to perform its statutory and constitutional duties, or communicating any of the many other ideas that one might express in a legislative prayer, Appellant would use the Opening Ceremony to persuade others of the

correctness of his constitutional theological views and to disparage the constitutional and theological views of others. *Compare Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (observing that the content of a legislative prayer is not constitutionally significant so long as "there is no indication that the prayer oppotunity has been exploited to proselytize or advance any one, or to disparage any other faith or belief"). What Appellant proposed to say in the Opening Ceremony is not a legislative prayer at all, but a piece of partisan political rhetoric.

Accordingly, when Mr. Hall wrote to Appellant on June 30, 1994 that the purpose of the messages delivered in the Opening Ceremony was "to allow individuals the opportunity to express thoughts, leave blessings, etc.," and not to "express political views, attack city policies or practices or mock city practices or policies," he was not taking an ad hoc position designed to exclude Appellant from the Opening Ceremony on the basis of his religious views, but was merely articulating a viewpoint-neutral subject-matter restriction that had been instituted and consistently followed for over a decade, even if it had not been reduced to writing--namely, the well-established and -understood boundaries to the genre of legislative prayer. *Cf. Snyder IV*, 159 F.3d at 1236 (finding that evidence did not support contention that Hall drafted guidelines specifically to exclude Appellant's proposed prayer; rather, "Hall was concerned with the political

nature of the proposed prayer and with the fact that it was not consistent with the genre of legislative invocational prayer for which the [Opening Ceremony] had been reserved").

(2) Restricting Access to Speakers Willing to Deliver a Legislative Prayer Is Reasonable.

"The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.'" *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (quoting Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969)). Thus, whether a subject matter restriction is "reasonable" depends on whether the excluded expression "is basically incompatible with the normal activity of a particular place at a particular time." *Id.* The reasonableness of a subject-matter restriction might also depend on whether there are adequate alternative places for expression of the excluded speech.

The purpose of the Opening Ceremony is to set a lofty and inspirational tone for the City Council meeting by means of thoughts that promote civility, pronounce blessings, and direct serious attention to agenda items. (R. 340-41, 345-46, 349-50, 354, 356); *see also Snyder I*, 902 F. Supp. at 1448. Attacks on city policies, mocking references to city practices, and other political criticisms such as those contained in Appellants proposed "prayer" are obviously not consistent with the purpose of the Ceremony. Indeed, allowing an unrestricted political free-for-all as part of the Opening

Ceremony would completely frustrate its intended purpose of solemnizing the opening of City Council meetings.

The reasonableness of the City's subject-matter restriction is buttressed by the fact that the City has provided a "Public Comment" period in every Council meeting which is specifically reserved to members of the public for unrestricted speech about city policies and practices. Indeed, Appellant was expressly invited by Mr. Hall to deliver his "prayer" during the Public Comment period. The City's restriction of speech in the Opening Ceremony to legislative prayer is reasonable, not only because it allows the Opening Ceremony to accomplish the purposes for which it was created, but also because political criticism and other speech excluded from the Opening Ceremony can be fully expressed later on in the meeting.

"The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 48 (1966). On government property that does not constitute a public forum, the government is empowered to restrict speech to that which is reasonably consistent with normal use of the property. It was clearly reasonable for the City to restrict speech in the Opening Ceremony to that falling within the genre of legislative prayer, so as to accomplish its purpose of solemnizing and setting the proper tone for Council meetings by promoting civility, lofty thoughts, and attention to agenda items.

Since Appellant's proposed "prayer" fell outside of that subject-matter restriction, it was properly excluded from the Opening Ceremony.

D. THE DELIVERY OF LEGISLATIVE PRAYERS IN THE OPENING CEREMONY DOES NOT VIOLATE ARTICLE I, § 4 BECAUSE THE OPPORTUNITY TO DELIVER A PRAYER IS PROVIDED ON A RELIGIOUSLY NEUTRAL BASIS AND THUS PROVIDES ONLY AN INDIRECT BENEFIT TO RELIGION.

Appellant claims that the City's refusal to allow Snyder to deliver his "prayer" as part of the Opening Ceremony violated the prohibition against the government expenditure of money or use of property to aid religion contained in Article I, § 4 of the Utah Constitution. Specifically, he argues that by excluding Snyder from the Opening Ceremony, it has discriminated against those who hold "nontraditional religious tenets" or no religious tenets at all in violation of § 4's constitutional mandate of neutrality. Brief for Appellant, at 39--40.

The test for the constitutionality of government action under Article I, § 4 was set forth by this Court in *Whitehead*, 870 P.2d 916 (Utah 1993). Reviewing Salt Lake City's practice of opening city council meetings with prayer, this Court held that Article I, § 4 is not violated when "public money or property that benefits religious worship exercise, or instruction or any ecclesiastical establishment qualifies as an indirect benefit." *Id.* at 938. The Court went on to hold that a benefit to religion from state money or property is indirect if (1) it is "provided on a nondiscriminatory basis," and (2) it is "equally

accessible to all." *Id.* Applying this test, this Court upheld an opening ceremony that was virtually identical to the City's Open Ceremony at issue in this case. *Id.* at 939.

The Opening Ceremony satisfies both elements of the *Society of Separationists* test. First, access to the Opening Ceremony is provided "without regard to the belief system" of the participant. *Society of Separationists*, 870 P.2d at 938. The record shows that the City has taken great pains to draw participants from a broad and religiously diverse cross-section of the City's population. Indeed, in prior proceedings in this case, the federal district court expressly found that the manner in which the City selected participants for the Opening Ceremony "is neutral and nondiscriminatory and does not constitute a preference of one group or religion over another." *Snyder II*, 902 F. Supp. at 1457 (Finding No. 3), *aff'd*, *Snyder III*, 124 F.3d at 1354 ("The record in this matter is devoid of evidence that Murray City had impermissible motives either in extending invitations to speak, or in denying Mr. Snyder's request. Similarly absent is any suggestion that Murray City used the reverence portion of its city council meetings to advance a particular faith or to disparage any faith") (footnote omitted). Appellant himself concedes this, using the admitted diversity of the participants in the Opening Ceremony as a basis for his mistaken argument the Opening Ceremony is a designate public forum. In fact, the record shows that any member of the general public, including Mr. Snyder, who wishes to deliver a message within the genre of legislative prayer,

regardless of religious affiliation or lack thereof, is presumptively eligible to do so. (See, e.g., R. 134.) *Compare Society of Separationists*, 870 P.2d at 938 ("Lutherans or Latter-day Saints who wish to use the facilities must have access on exactly the same terms as the Loyal Order of Moose, the American Atheist Society, or the Libertarian Party").

The second element of the *Society of Separationists* test does not apply here because the opportunity to participate in the Opening Ceremony is not a scarce resource that needs to be allocated. To the contrary, the record indicates that the City had to solicit persons to participate in the Opening Ceremony. (R. at 143, 151, 340, 350-51.) *Compare Society of Separationists,* 870 P.2d at 939 (""[T]he record shows that the resource here is not one that had to be allocated; there were more opportunities in the schedule for participants to give opening remarks than there were interested speakers").

Even if this second element does apply, the City's practices satisfy it. If a government benefit is a scarce resource that must be allocated among multiple users, "the government must implement a system that awards the benefit so that each group, religious or secular, has a realistically equal opportunity" to receive the benefit. *Society of Separationists*, 870 P.2d at 938. (R. at 340, 350-51.)

Appellant has misunderstood the neutrality requirement of *Society of Separationists*. That requirement does not require that a participant be permitted to say whatever he or she wishes in the Opening Ceremony, but rather, that what a participant is

permitted to say be determined "without regard to the belief system" of the participant. *Id.* Appellant was not excluded because Mr. Hall or the City disagreed with Appellant's religious beliefs, as he maintains, but because Appellant's proposed "prayer" did not fall within the subject-matter restriction which the City has properly placed on the Opening Ceremony.

The City's exclusion of Appellant from the Opening Ceremony did not violate Article I, § 4. Any benefit to religion was indirect, the result of the City's provision of a government benefit on a religiously nondiscriminatory basis.

E. PLAINTIFF'S DUE PROCESS CLAIM FAILS.[16]

Utah's Due Process Clause provides: "No person shall be deprived of life, liberty or property, without due process of law." Utah Const., Art. I, Sec. 7.[17] There are several problems with Mr. Snyder's due process claims.

Due process is meant to reduce the chance of an erroneous deprivation through safeguards. Due process is fact-dependent, fluid and flexible. It calls for such procedural protections as the particular situation demands; no single model of procedural fairness, let alone a particular form of procedure, is dictated by the due process clause. *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976); *Kremer v. Chemical Const. Corp.*, 456 U.S. 461,

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[16]See, *supra*, note 7.

[17]See *supra*, note 10.

482-83, *reh'g denied*, 458 U.S. 1133 (1982). Conceptually, it is that before the government may deprive life, liberty or property, one has a right to notice and an opportunity to respond in a meaningful way. The more significant the underlying interest, the more formal the process.[18] The type of procedural requirement in any given situation depends on the private interests at stake, the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguards, and the governmental interest affected. *Little v. Streater*, 452 U.S. 1, 5-6 (1981); *Matthews v. Eldridge*, 424 U.S. 319, 333-35 (1976).

The Due Process Clause, however, "has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible . . . interest be so comprehensive as to preclude any possibility of error." *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). Due process "does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations." *Id.* Rather, the concept of due process is that some procedure minimizes the risk of erroneous decisions. *Id.* The "specific dictates of due process must be shaped by 'the risk of error inherent in

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[18]As the Supreme Court explained:

> "[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Stanley v. Illinois, 405 U.S. 645, 650 (1972) (citations omitted).

the truth finding process as applied to the generality of cases . . . .'" *Id.* at 14 (citations omitted). The fairness of a particular procedure does not turn on the result obtained in any given case, but rather on whether the process provided safeguards against risk of error inherent in truth finding as applied generally. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985).

What life, liberty or property was Mr. Snyder deprived within the meaning of procedural due process? As held by the Tenth Circuit, nothing. He was offered every reasonable opportunity to air his grievances or to practice his "religion" consistent with Murray City's rules of order and civility and the purpose of the Opening Ceremonies. The City offered Mr. Snyder the opportunity to discuss the matter, which he declined to do. It offered him the opportunity to be put on the agenda, which he declined. It offered him the opportunity to give his "prayer" during the Public Comment portion of the Meeting, which he declined. Mr. Hall asked Mr. Snyder to contact him or provide a means for him to contact Mr. Snyder, which Mr. Snyder declined.

In addition, the Due Process Clause is not implicated by official conduct which amounts to negligence or inadvertence. *Daniels v. Williams*, 474 U.S. 327, 329-33 (1986) (adopting the analysis in the concurring opinions of Justices Powell and Stewart in *Parratt v. Taylor*, 451 U.S. 527, 545, 548 (1981) (to hold that losses based on negligence or inadvertence violate the due process clause "trivialize[s]" and "grossly . . .

distort[s] the meaning and intent of the Constitution")[19]). Appellant cannot show the City's conduct amounted to anything more than inadvertence in terms of procedural due process. The City offered Mr. Snyder the opportunity to discuss the matter, the opportunity to be put on the agenda, and the opportunity to give his "prayer" during the Public Comment portion of the Meeting, all of which he declined. Instead, upon receiving the letter from Murray City, he promptly faxed it to his attorney, and the same day filed the federal complaint. He could have had his captive audience and given his statement, but he chose not to.

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[19]Justice Powell stated:

> A "deprivation" connotes an intentional act denying something to someone, or at the very least, a deliberate decision not to act to prevent a loss. The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations . . . . [S]uch a rule would avoid trivializing the right of action provided in § 1983. That provision was enacted to deter real *abuses* by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law.

Parratt, 451 U.S. at 548-49 (emphasis in original); *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445, 1446-47 (10th Cir. 1990) (police officer's negligent operation of vehicle did not violate due process clause).

XII. CONCLUSION

For these reasons, the trial court's Order should be affirmed.

DATED this 6th day of December, 2001.

SNOW, CHRISTENSEN & MARTINEAU

By 

Richard A. Van Wagoner
Allan L. Larson
Attorneys for Defendants/Appellees

XIII. ADDENDUM

1. *Snyder v. Murray City Corp.*, 902 F. Supp. 1444 (D. Utah 1995), *reh'g denied.*
2. *Snyder v. Murray City Corp.,* 902 F. Supp. 1455 (D. Utah 1995)
3. *Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997)
4. *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir 1998), *cert. denied,*(1999)
5. Determinative Provisions
6. Memorandum Decision, dated February 9, 2001

Tab 1

911, 914 (10th Cir.1984), the portion of the settlement proceeds allocable and allocated to punitive damages and distributed to Plaintiff herein was not "received on account of personal injury" and thus is not excludable from income pursuant to 26 U.S.C. § 104(a)(2). Plaintiff argues that because the claim on which the punitive damages were awarded was one which sounds in tort, and an award of actual damages is necessary under Oklahoma law to support an award of punitive damages, punitive damages are necessarily "received on account of personal injury" and excludable under Section 104(a)(2) to the same extent that the underlying tort claim (for compensatory damages) is a personal injury tort claim. This argument is foreclosed by the following statement by the Supreme Court in *Schleier*:

> There are two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is based upon tort or tort type rights; and second, the taxpayer must show that the damages were received on account of personal injuries or sickness.
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> *Commissioner of Internal Revenue v. Schleier*, 515 U.S. at ——, 115 S.Ct. at 2167, 132 L.Ed.2d at 307.

Moreover, while there is some superficial appeal to Plaintiff's argument that "but for" the underlying personal injury tort, the Autery Estate would have had no claim for punitive damages and thus that punitive damages must be considered "received on account of personal injury," the Court agrees with the Fourth Circuit's reasoning in *Commissioner of Internal Revenue v. Miller*, 914 F.2d 586 (4th Cir.1990) and those circuit courts which have followed *Miller* in rejecting this argument.

Plaintiff's motion for summary judgment is GRANTED in part, to the extent that the settlement proceeds may be and are allocated to $600,000.00 in contract damages, $130,000.00 in compensatory damages on the tort claim for bad faith and $583,754.00 in punitive damages and to the extent that Plaintiff's distribution of her share of the contract damages and compensatory bad faith damages are excludable from gross income pursuant to 26 U.S.C. § 104(a)(3) and § 104(a)(2), respectively. Plaintiff is entitled to a refund of income taxes paid on her distributive share of the $730,000 of the settlement proceeds attributable to contract damages and compensatory bad faith damages. Plaintiff's motion is DENIED insofar as Plaintiff asserts that the settlement proceeds attributable to punitive damages and her distributive share thereof are excludable from income pursuant to 26 U.S.C. § 104(a)(2). Defendant's motion for summary judgment is likewise GRANTED in part and DENIED in part. Defendant's motion is GRANTED with respect to Plaintiff's distributive share of $583,754.00 of the settlement proceeds attributable to punitive damages. Plaintiff is not entitled to a refund of income taxes paid on said amount. In all other respects Defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

Tom SNYDER, Plaintiff,

v.

MURRAY CITY CORPORATION, a municipal corporation, and H. Craig Hall, City Attorney for Murray City Corporation, Defendants.

No. 94-CV-667 G.

United States District Court, D. Utah, Central Division.

Sept. 13, 1995.

Challenger filed civil rights action against city council after his "prayer" was not chosen for reading during portion of meeting set aside for prayer. On cross-motions for summary judgment, the District Court, J. Thomas Greene, J., held that: (1)

city corporation was not entitled to Eleventh Amendment immunity; (2) prayer submitted by plaintiff for reading at city council meeting was not entitled to protection under free exercise clause; (3) regulation that prayers be given during "reverence portion" at opening of meeting, and that such embody lofty thoughts, was reasonable; (4) plaintiff's rights to free exercise or freedom of speech rights were not violated by not selecting his prayer to be read at "reverence portion" of meeting; (5) establishment clause was not violated; (6) neither plaintiff's substantive nor procedural due process rights were violated; (7) plaintiff could not bring direct action under nonself executing clauses of Utah Constitution; and (8) city corporation and city attorney were immune from state law claims.

Defendants' motion granted, plaintiff's motions denied.

1. Federal Courts ⇐418

Whether state agency is entitled to Eleventh Amendment immunity is matter of federal law. U.S.C.A. Const.Amend. 11.

2. Federal Courts ⇐270

City corporation was not entitled to Eleventh Amendment immunity from § 1983 civil rights action. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

3. Civil Rights ⇐192

To prevail under any § 1983 claim, plaintiff must establish that defendants deprived her of right, privilege, or immunity secured by United States Constitution. 42 U.S.C.A. § 1983.

4. Constitutional Law ⇐84.2

For free exercise of religion claim to survive dispositive motion, threshold determination that religious belief or practice in question is sincere and "truly held" by party claiming injury must be made. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐84.5(1)
Municipal Corporations ⇐92

Prayer submitted by plaintiff for reading at city council meeting was not entitled to protection under free exercise clause, since plaintiff did not have "truly held" belief; "prayer" offered by plaintiff presented argument against tradition of opening meetings with prayer, prayer set forth political comment concerning city practices and policies, prayer conditionally addressed "mother in heaven," and closed conditionally in name of God's son. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐84.5(1)

A prayer that is not rooted in religion, that is conditional in expression, and that is devoid of truly held religious beliefs, is not afforded protection under free exercise clause; furthermore, secular views do not qualify as protected speech under free exercise clause. U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇐84.1

Free exercise of religion does not excuse compliance with otherwise valid regulation of conduct. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇐84.5(1)

Regulation by city council that prayers be given during "reverence portion" at opening of meeting, and that such embody lofty thoughts, was reasonable and did not impose burden on free exercise of religion. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇐90(3), 90.1(1)

Government may place reasonable time, place, and manner restrictions on religious as well as non-religious speech, especially in non-public forum such as city council meetings; nature of forum and pattern of its normal activities, dictate kinds of regulations of time, place, and manner that are reasonable. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ⇐84.5(1), 90.1(1)

Although plaintiff's "prayer" was not selected to be read at opening of city council meeting reserved for prayer, plaintiff's rights of free exercise of religion or freedom of speech were not violated, since plaintiff was not excluded from meeting and was invited to give his statement at later portion of meeting reserved for public comment. U.S.C.A. Const.Amend. 1.

11. Constitutional Law ⇐84.1

Fundamental tenet of establishment clause is that government shall be neutral and must not favor one religious view over another. U.S.C.A. Const.Amend. 1.

12. Constitutional Law ⇐84.5(1)
Municipal Corporations ⇐92

City council's act of not allowing plaintiff to offer his particular prayer during "reverence portion" of meeting set aside for prayer did not violate establishment clause; reverence portion of meeting was non denominational, non sectarian and non proselyting in character, plaintiff's "prayer" disparaged faith and beliefs of others, it constituted political commentary concerning city's practices, and it proselytized and advanced plaintiff's belief concerning church and state, and plaintiff was given opportunity to present prayer at portion of meeting reserved for public comment. U.S.C.A. Const.Amend. 1.

13. Constitutional Law ⇐254.1, 277(1)

Essential prerequisite to any claim that Fourteenth Amendment due process clause has been violated is existence of constitutionally cognizable liberty or property interest. U.S.C.A. Const.Amend. 14.

14. Constitutional Law ⇐274(3.1)
Municipal Corporations ⇐92

Although plaintiff's "prayer" was not chosen to be read at opening of city council meeting, plaintiff could not assert that his substantive due process rights were violated thereby, since no constitutionally cognizable liberty or property interest was implicated; plaintiff's religious expression did not pass as "truly held" statement of belief and plaintiff was given other adequate methods of expression. U.S.C.A. Const.Amend. 14.

15. Constitutional Law ⇐318(2)
Municipal Corporations ⇐92

City council had no due process obligation to provide plaintiff with hearing on whether plaintiff's "prayer" criticizing city council's practice of reading prayer at opening of meetings was itself fit to be opening prayer, since there was no deprivation of life, liberty, or property. U.S.C.A. Const.Amend. 14.

16. Action ⇐2, 3
Constitutional Law ⇐29

There was no direct statutory or common law private cause of action for violation of provisions of Utah Constitution which were not self-executing; free exercise, establishment, and due process clauses of Utah Constitution were not self-executing and contained no provision or mechanism for court action or remedy. Utah Const. Art. 1, §§ 4, 7.

17. Action ⇐2, 3

Plaintiff could not bring direct action under free exercise, establishment, or due process clauses of Utah Constitution in challenging city council's practice of opening meetings with prayer, and for asserted violations of rights after city counsel refused to read his "prayer" in portion of meeting reserved for prayer. Utah Const. Art. 1, §§ 4, 7.

18. Municipal Corporations ⇐723

Pursuant to Utah Governmental Immunity Act, city corporation was immune from suit by plaintiff who challenged city council's practice of opening meeting with prayer, and who asserted that city council's refusal to read his prayer at portion of meeting reserved for prayer was violation of his rights under state law. U.C.A.1953, 63-30-3(1).

19. Officers and Public Employees ⇐119

In situations where governmental immunity is waived as to governmental employees, notice and other requirements of Utah Governmental Immunity Act must be met as condition precedent to bringing action. U.C.A.1953, 60-30-4(4), 63-30-10(2).

20. Municipal Corporations ⇐747(1)

Pursuant to Utah Governmental Immunity Act, city attorney was immune from suit by plaintiff who challenged city council's practice of opening meeting with prayer, and who asserted that city council's refusal to read his prayer at portion of meeting reserved for prayer was violation of his rights under state law, since state did not waive immunity of employee for negligent violation of civil rights and there was no allegation of fraud or malice or that attorney acted out-

side scope of authority; also, plaintiff failed to comply with notice requirements of Act. U.C.A.1953, 63-30-3(1).

Brian M. Barnard, John Pace and Joro Walker, Salt Lake City, for plaintiff.

Allan L. Larson and Richard A. Van Wagoner, Salt Lake City, for defendants.

MEMORANDUM DECISION AND ORDER

J. THOMAS GREENE, District Judge.

This matter is before the court on Defendants' Murray City Corporation ("Murray") and H. Craig Hall ("Hall") Motion for Summary Judgment and Plaintiff Tom Snyder's ("Snyder") Motion for Summary Judgment [1] and Motion for Partial Summary Judgment. Plaintiff is represented by Brian M. Barnard, John Pace, and Joro Walker. Defendants are represented by Allan L. Larson and Richard A. Van Wagoner. The United States has intervened to present an argument in regard to the constitutionality of the Religious Freedom Restoration Act.

All parties filed memorandums and supporting materials. The court determines that oral argument would not be of material assistance in the resolution of this matter and will decide the motions on the basis of the extensive written materials which have been presented, and the files and records of this case.

FACTUAL BACKGROUND

Since 1982, Murray City Council meetings have followed the tradition and practice of beginning with a short prayer in the opening "reverence portion" of the meeting in order to encourage lofty thoughts, pronounce blessings and set an inspirational tone for the balance of the meeting. The Murray City Council invites individuals representing a broad cross section of religious faiths to give these opening prayers.

After the opening prayer or message, there is an open "citizen comment" period in which any citizen has the opportunity to express his or her political views and comments on city practices and policies with no restriction as to content. Citizens may participate in this portion of the meeting without prior notice, or they may arrange prior to any council meeting to be formally scheduled on the meeting's agenda in order to express viewpoints.

On June 9, 1994, plaintiff sent a letter with a "prayer" enclosed [2], which was referred to

1. Plaintiff filed a motion for judgment on the pleadings which this court ruled should be regarded as a motion for summary judgment.

2. The text of the prayer is as follows:

"Our mother, who art in heaven (if, indeed there is a heaven and if there is a God that takes a woman's form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

"We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

"We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats' decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings;

"We ask that you grant Utah's leaders and politicians enough courage and discernment to understand that religion is a private matter between every individual and his or her deity; we beseech thee to educate government leaders that religious beliefs should not be broadcast and revealed for the purpose of impressing others; we pray that you strike down those that misuse your name and those that cheapen the institution of prayer by using it for their own selfish political gains;

"We ask that the people of Utah will some day learn the wisdom of the separation of Church and State; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our gods;

"We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the state of Utah by the actions of misguided, weak and stupid politicians, who abuse power in their own self-righteousness;

"All of this we ask in thy name and in the name of thy son (if in fact you had a son that

Murray City Attorney Craig Hall with the request that plaintiff be allowed to present the statement as a prayer at the next city council meeting. On June 30, on behalf of Murray City, Mr. Hall sent a letter to plaintiff rejecting this statement as a "prayer" to be given in the opening portion of the meeting, but advising that it could be presented as an agenda item at the public comment portion of the meeting[3]. Plaintiff chose not to offer his statement or "prayer" during the public comment portion of any meeting, nor did he request to be put on the agenda. Instead, he filed this suit.

Plaintiff is familiar with the Utah Supreme Court decision in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993) and does not agree with the ruling of the Utah court in that case.[4] Defendants allege that plaintiff's "prayer" constitutes a response to that decision as well as a statement of plaintiff's political views on the separation of church and state and disparagement of persons and the practice of permitting prayers to be given at the opening of city council meetings.

ANALYSIS

Plaintiff asserts seven causes of action: 1) Violation of 42 U.S.C. § 1983 based on the Free Exercise of Religion under the United States Constitution; 2) Violation of the Free Exercise of Religion under the Utah Constitution; 3) Violation of 42 U.S.C. § 1983 based on the Establishment Clause of the United States Constitution; 4) Violation of the Establishment Clause of the Utah Constitution; 5) Violation of 42 U.S.C. § 1983 based on the denial of Federal Due Process; 6) Denial of State Due Process; 7) Violation of the Religious Freedom Restoration Act. The claims asserted under the United States Constitution and the claims asserted under the Utah Constitution will be considered separately.

I. CLAIMS UNDER THE UNITED STATES CONSTITUTION.

[1, 2] Plaintiff brings his federal constitutional claims under authority of 42 U.S.C. § 1983 which permits suits against any

> person who, under color of statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the constitution ...

The Supreme Court has interpreted § 1983 to be applicable to municipalities. In *Monell v. New York City Dept. Of Soc. Serv.*, the Court held:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief ...

436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978). However, for purposes of Eleventh Amendment immunity, the court limited the scope of such actions to governmental units that are not part of the state for

visited earth) for the eternal betterment of all of us who populate the great state of Utah.

"Amen."

3. Mr. Hall wrote in the June 30 response letter:

"The Municipal Council has not established formal policies regarding the nature and/or content of this reverence portion of their agenda. However, the Council has established the policy that all council meetings will start with prayer.

"The purpose of the 'prayer' is to allow individuals that opportunity to express thoughts, leaves blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies.

"Comments on present city practices or policies may be made at city council meetings by one of two methods: either by requesting to be placed on the agenda, or taking up to three minutes during the 'citizen comment' portion of the meeting. The later method requires no prior arrangements to be made."

4. In *Whitehead*, the Utah Supreme Court held that the Salt Lake City Council's practice of allowing prayer to be given during the opening remarks portion of city council meetings did not violate the Utah Constitution's prohibitions against union of church and state.

Plaintiff proclaims his disagreement as follows: "I don't like public prayer. I don't think it is proper. I disagree with the Utah Supreme Court...." (Snyder Depo. at 84).

Eleventh Amendment analysis. *Id.* at 690 n. 54, 98 S.Ct. at 2035 n. 54. Recently, in *Hess v. Port Authority Trans-Hudson*, — U.S. —, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), the Supreme Court declared that city and county governments do not enjoy Eleventh Amendment immunity.[5] In light of the *Hess* case, Murray City Corporation is not entitled to Eleventh Amendment immunity from plaintiff's § 1983 claims.

[3] To prevail under any § 1983 claim, a plaintiff must establish that defendant(s) deprived her of a right, privilege, or immunity secured by the United States Constitution. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981); *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980).

A. Free Exercise of Religion.

Plaintiff bases the first of his § 1983 claims on defendants' alleged violation of his constitutional right of free exercise of religion.[6] For the following reasons, plaintiff's claim fails as a matter of law.

1. Sincerity of Belief.

[4] The threshold determination for a free exercise of religion claim to survive a dispositive motion is that the religious belief or practice in question is sincere and "truly held" by the party claiming injury.[7] In this regard, the Supreme Court stated in *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965):

> But we hasten to emphasize that while the 'truth' of a belief is not open to question, *there remains the significant question whether it is 'truly held'. This is the threshold question of sincerity which must be resolved in every case.*

(emphasis added). Thus, while it is not the province of this court to question the content of plaintiff's belief, it is the duty of this court to resolve the threshold question of the sincerity thereof and whether it is "truly held" as related to the "prayer" he desires to deliver.

[5] Examination of the text of plaintiff's "prayer" provides a definitive perspective from which the determination of sincerity can be made. On its face, the so-called "prayer" to be offered by plaintiff presents an argument against the tradition of opening meetings with prayer as being akin to the "evil of forced religious worship," and sets forth political comment concerning city practices and policies which are disapproved by plaintiff, rather than sincere religious beliefs.[8] Plaintiff would use the "prayer" as a vehicle to air his views concerning the separation of church and state, and to disparage and "strike down" "misguided, weak and stupid" politicians and government officials who are caught up in the "evil of forced religious worship."[9] Moreover, Snyder's "prayer" does not reveal a truly held belief in deity in that it only conditionally addresses a "mother in heaven," i.e. ("if, indeed there is a heaven and if there is a God that takes a woman's form"), and closes conditionally in the name

5. The Tenth Circuit arrived at a similar conclusion as to school districts in *Ambus v. Granite Board of Education*, 995 F.2d 992 (10th Cir. 1993). The Utah Governmental Immunity Act defines a "political subdivision" as "any county, city, town, school district, ..., or other governmental subdivision or public corporation." Utah Code Ann. § 63-30-2(7). However, whether a state agency is entitled to Eleventh Amendment immunity is a matter of federal law. *Garcia v. Board of Educ. of Socorro Consol. Sch. Dist.*, 777 F.2d 1403 (10th Cir.1985), *cert. denied*, 479 U.S. 814, 107 S.Ct. 66, 93 L.Ed.2d 24 (1986).

6. The First Amendment states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof ..." This amendment applies to states through the Fourteenth Amendment under clearly established Supreme Court case law.

7. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965); *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993).

8. Plaintiff admittedly is unsure of his religious beliefs, does not adhere to any particular church or group, does not profess any single faith, and has no definitive structure of religious views. Snyder Depo. at 14-15, 21-25.

9. *See supra* note 2.

of God's son, i.e. ("if in fact you had a son that visited earth.")

[6] A "prayer", such as plaintiff's, that is not rooted in religion, that is conditional in expression, and that is devoid of truly held religious beliefs, is not afforded protection under the free exercise clause.[10] Furthermore, secular views do not qualify as protected speech under the free exercise clause. *Frazee v. Employment Security Department*, 489 U.S. 829, 833, 109 S.Ct. 1514, 1517, 103 L.Ed.2d 914 (1989) (citing *Seeger* and *Yoder*).[11]

This court determines that on the face of the "prayer" which plaintiff wants to offer, the threshold question of whether a sincerely held religious belief exists and is "truly held" must be answered in the negative.[12]

2. Restrictions on the Offering of Prayer and Religious Speech at Public Meetings.

[7, 8] There is an additional reason for determining that plaintiff's "prayer" does not constitute the legitimate free exercise of religion under the United States Constitution. Free exercise of religion does not excuse compliance with an otherwise valid regulation of conduct. *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).[13] Defendants' regulation of the offering of prayers at council meetings requires that such be given during the "reverence portion" at the opening of the meeting, and that such embody lofty thoughts, such as blessings, as distinguished from the expression of political views. This court considers the regulation to be reasonable and that it

10. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. at 713–714, 101 S.Ct. at 1429–1430, the Supreme Court stated: "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." In *Thomas*, the court held that denial of unemployment compensation to a member of Jehovah's Witnesses, who voluntarily quit his job because of his religious beliefs, was a violation of the free exercise clause of the first amendment. *Thomas* is distinguishable from the case at bar because Snyder claims he does not believe in prayer at city council meetings, but nevertheless wishes to present his prayer in the reverence portion of the council meeting.

11. In *Frazee*, the Supreme Court stated that "[p]urely secular views do not suffice (to warrant first amendment protection)." 489 U.S. at 833, 109 S.Ct. at 1517.

12. Both parties, as well as the State of Utah as intervenor, address the constitutionality of the Religious Freedom Restoration Act. However, in view of this court's conclusion that plaintiff's free exercise claim is not based on a sincere, "truly held" religious belief, the Murray City policy of providing for prayer only during the reverence portion of its meetings imposes no "substantial burden" on plaintiff's free exercise of religion rights. Moreover, he was given the option of expression during other portions of the council meeting. Accordingly, the court does not reach the constitutional challenge of the Religious Freedom Restoration Act which plaintiff asserts in the wake of *Dept. of Human Resources v. Smith*. The Alaskan Supreme Court questioned the constitutionality of RFRA in *Swanner v. Anchorage Equal Rights Commission, et al.*, 874 P.2d 274, 280 n. 9 (1994), but the U.S. Supreme Court declined the opportunity to review this question. *Swanner v. Anchorage Equal Rights Commission, et al.*, — U.S. —, 115 S.Ct. 460, 130 L.Ed.2d 368 (1994). The interesting problem of whether Congress can constitutionally establish an evidentiary standard of "compelling interest" despite the Supreme Court's ruling in *Smith*, which approved of neutral governmental regulations which create no "substantial burden" on religion, must await another day.

13. In *Smith*, the plaintiffs were fired by a drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony in a Native American Church. The Supreme Court held that an Oregon Statute prohibiting the knowing or intentional possession of a "controlled substance" did not violate the free exercise of religion clause of the First Amendment. The Court said:

> We have never held that an individual's religion beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition ... 'Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.' (quoting *Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594–95, 60 S.Ct. 1010, 1012–13, 84 L.Ed. 1375 (1940)).

494 U.S. at 878–79, 110 S.Ct. at 1599–1600.

does not impose a substantial burden on the free exercise clause. To find otherwise would be to grant every individual the ability to disobey otherwise valid laws and neutral regulations under the guise of free religious exercise.[14]

[9] Plaintiff has neither suffered violation of his free exercise of religion nor his protected free speech rights under the First Amendment. Manifestly, government may place reasonable time, place, and manner restrictions on religious as well as non-religious speech—especially in a non-public forum such as Murray City Council meetings. *See Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (governmental workplace is treated as a non-public forum during hours of government business). The nature of a forum and "the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable". *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972).

In *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), the Supreme Court upheld a governmental restriction on the manner of religious expression at a fair. The defendant in *Heffron* challenged the restrictions on similar grounds that plaintiff has challenged those of the Murray City Council. The Supreme Court held that such a restriction does not violate constitutionally protected free speech or free exercise of religion. *Heffron* is apropos to this case since the plaintiff in that case, like the plaintiff here, was not prohibited from exercising the right of expression only the means of exercising the right was restricted.

[10] In the case at bar, plaintiff was not excluded from the Murray City Council meeting, nor was he prevented from airing his views at the council meeting or in any other forum. Instead, he was asked to give his statement or "prayer" at a later portion of the meeting reserved for public comment.[15] As in *Heffron*, such a restriction does not constitute a violation of either free exercise of religion or freedom of speech.

B. Establishment of Religion.

Plaintiff brings a § 1983 claim based on the Establishment Clause of the First Amendment of the Federal Constitution[16], asserting that by excluding plaintiff's religious expression, defendants have unconstitutionally discriminated against plaintiff's religion and provided preferential treatment to "mainstream" religious views.

[11] A fundamental tenet of the Establishment Clause is that the government shall be neutral and must not favor one religious view over another. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). In that case the Supreme Court stated:

> [T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' *Lynch v. Donnelly*, 465 U.S. 668, 678, 79 L.Ed.2d 604, 104 S.Ct. 1355 [1361 (1984)].

Id.

In *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), the Supreme Court held that the Nebraska Legislature's chaplaincy practice did not violate the Establishment Clause. The Court compared the Nebraska Legislature's practice to that of the United States Congress where, since

14. The Supreme Court stated in *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941):

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

15. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (requiring government to leave open alternative channels of communication in light of regulation).

16. *See supra* note 6.

the creation of Congress, prayer has been offered every session. The Court refused to interpret the Establishment Clause as imposing more stringent first amendment limits on the states than are imposed upon the federal government and said:

> The tradition in many of the Colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain ... Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.
>
> On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights ... Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states.

Id. at 793–95, 103 S.Ct. at 3337–38.

In *Marsh*, the Court overruled the Eighth Circuit, which had concluded—following application of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S.Ct. 2105, 2111–12, 29 L.Ed.2d 745 (1971), as set out in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973)—that the chaplaincy practice violated all three prongs of the test; i.e. that no secular purpose was presented, that the primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression, and that use of state money for compensation and publication constituted unlawful entanglement. *Chambers v. Marsh*, 675 F.2d 228, 233–35 (1982). The Supreme Court declined to apply the *Lemon* test and simply overruled the Eighth Circuit based on a history of prayer analogous to the practice nationally adopted by the First Congress and followed traditionally since then.

Plaintiff asserts that once a city encourages and allows members of the public to give prayers during the "reverence portion" of its meeting, the Constitution requires the city to keep the forum open and available for the entire spectrum of religious expression, without restriction of access to the forum based on the content of the religious message to be expressed. Snyder Depo. at 86; Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment at 16–18. To the contrary of the wholly unrestricted approach advocated by plaintiff, the Supreme Court stated in *Marsh* that

> [t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id., 463 U.S. at 794–95, 103 S.Ct. at 3337–38. This may be taken to signal that the content of a prayer that exploits, proselytizes, disparages other faiths or beliefs, or advances any one religion may require judicial evaluation.

[12] In the case at bar, prayer is a traditional part of the Murray City Council meeting. The practice is reasonably regulated to fit within a designated "reverence portion" of the meeting, rather than the "citizen comment" portion of the meeting reserved for expression of political views and political discussion of city policies or practices. The reverence segment of the meeting is non denominational, non sectarian and non proselyting in character. Plaintiff's "prayer" could properly be presented in the "citizen comment" portion of the meeting, and plaintiff was offered that opportunity. Plaintiff's "prayer" was properly excluded from the "reverence portion" of the meeting, however, because it disparages the faith and beliefs of others, it constitutes political commentary concerning the city's practices, and it proselytizes and advances plaintiff's belief concerning church and state. This court holds that Murray City's actions which did not allow plaintiff to offer his particular "prayer" dur-

ing the reverence portion of the meeting, but did provide him with such an opportunity during the public comment portion of the meeting, did not violate the Establishment Clause.

C. Due Process.

[13, 14] Plaintiff claims that his rights under the Fourteenth Amendment have been violated.[17] An essential prerequisite to any claim that the Fourteenth Amendment due process clause has been violated is the existence of a constitutionally cognizable liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Under this court's analysis, plaintiff's religious expression does not pass as a "truly held" statement of belief. Because this threshold requirement is missing, and in view of the adequacy of other easily accessible methods of expression which were made available to plaintiff, no constitutionally cognizable liberty or property interest is implicated here and no substantive due process claim has been violated.

[15] Plaintiff also asserts violation of his procedural due process rights because the Murray City Council denied him a hearing concerning its decision to reject plaintiff's "prayer." Plaintiff has no right to require the Murray City Council to conduct a hearing on whether plaintiff's "prayer" is fit to be an opening prayer. Moreover, since there was no deprivation of life, liberty, or property, defendants had no due process obligation to provide plaintiff with such a hearing in any event.

II. CLAIMS UNDER THE UTAH CONSTITUTION.

A. Private Actions Under Non-Self Executing Provisions of the Utah State Constitution.

[16] There appears to be no direct statutory or common law private cause of action for violation of provisions of the Utah State Constitution which are not self-executing.[18] In *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990), the Utah Supreme Court recognized an exception in Article I § 22 which relates to just compensation for the taking of private property.[19] In *Colman*, the Court held the just compensation section of the Utah Constitution to be self-executing, mandatory, and obligatory. *Id.* at 635. The court noted that whether a particular constitutional provision is self-executing "involves the issue of whether the constitutional provision requires a legislative enactment to be enforced in the courts." *Id.* at 630. The free exercise, establishment, and due process clauses of the Utah Constitution are not self-executing and contain no provision or mechanism for court action or remedy.[20]

[17] The Utah Supreme Court entertained a private cause of action based upon Article I, Section 4, of the Utah Constitution in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993) in order to review a written policy of the Salt Lake City Coun-

17. The Fourteenth Amendment provides:
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law;* ... (emphasis added).

18. There is no statutory authorization in Utah for the bringing of private actions for violation of civil rights under the Utah Constitution analogous to the Federal Civil Rights Act, 42 U.S.C. § 1981, *et seq.*, under which private actions for violation of the United States Constitution may be asserted.

19. Article I, section 22 of the Utah Constitution provides:
> Private property shall not be taken or damaged for public use without just compensation.

20. In *Sauers v. Salt Lake County*, 735 F.Supp. 381, 386 (D.Utah 1990), this court observed:
> [I]n the absence of remedies otherwise expressly provided, there appears to be no general right to a private cause of action for violation of the Utah State Constitution ...

Of course, whether a private cause of action could be brought for violation of Utah State Constitutional provisions is a matter for determination by the Utah Supreme Court. *Id.* at 386 n. 9. *See also Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989) (Hall, J., dissenting) (noting that no private cause of action under the Utah State Constitution appears to exist since no remedy is provided); *Brown v. Wightman*, 47 Utah 31, 151 P. 366 (1915).

cil.[21] In the case at bar, while Murray City follows a tradition and practice that "all meetings will start with prayer," it "has not established formal policies regarding the nature and/or content of [the] reverence portion" of the meeting.[22] Plaintiff attacks the Murray City practice of permitting prayers insofar as it would exclude his expression, but seeks to participate in the "reverence portion" of the meeting by presenting his "prayer" and insisting that it be presented in that segment. In furtherance of plaintiff's asserted right to do so, he brings direct causes of action under non-self-executing provisions of the Utah Constitution. This court opines and holds that such direct actions may not be asserted under Utah law.

In addition, as is next discussed, this court also opines that plaintiff's claims are barred because defendants are immune from such claims under Utah law.

B. Utah Governmental Immunity Act.

The Utah Governmental Immunity Act (the "Act") provides:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function ...

Utah Code Ann. § 63–30–3(1) (1993).

[18] The Act does not provide for waiver of immunity for claims based on the free exercise, establishment, and/or due process clauses of the Utah Constitution as against political subdivisions of the state. A "political subdivision" is defined as any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation. Utah Code Ann. § 63–30–2(7) (1994). It follows that Murray City Corporation is immune from plaintiff's claims under Utah law.[23]

[19] As to governmental employees, such as defendant Murray City Attorney Hall, the Act does not waive immunity from claims for damages asserted in actions which arise from the negligent violation of civil rights.[24] In other actions, such as intentional conduct, the statute provides only a limited waiver for acts "*due to fraud or malice.*"[25] *Moreover,* in those situations where immunity is waived, the notice and other requirements of the legislation must be met as a condition precedent to bringing an action.

[20] This court holds that Murray City Attorney, Defendant Hall, is not subject to plaintiff's suit. It appears that the state has not waived immunity of its employees for injuries arising out of alleged negligent violation of civil rights, and that as to other actions for damages against state employees, immunity has been waived only for conduct

21. The Utah Supreme Court in *Whitehead* considered whether the opening ceremony policy for prayers in city council meetings adopted by the Salt Lake City Council was constitutional under the Utah Constitution. That policy provides in part: This opening to the City's legislative process is solely for a secular purpose, among other reasons, to: (1) provide a moment during which Council members and the audience can reflect on the importance of the business before the Council; (2) promote an atmosphere of civility; (3) encourage lofty thought and high-mindedness; (4) recognize cultural diversity; (5) foster sensitivity for and recognize the uniqueness of all segments of our community. The presentations are meant to be non-denominational and non-proselytizing in character; however, the City will not dictate the form or content.

22. *See supra* note 3.

23. The Supreme Court of Utah has not passed upon the constitutionality of the Governmental Immunity Act as applied to actions based upon the Utah Constitution, and this court declines to do so.

24. Immunity is waived for a negligent act or omission of an employee committed within the scope of their employment *except if the injury arises out of ... a violation of civil rights.* Utah Code Ann. § 63–30–10(2) (emphasis added).

25. The Governmental Immunity Act states:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under the color of authority, *unless it is established that the employee acted or failed to act due to fraud or malice.*

Utah Code Ann. § 63–30–4(4) (1993) (emphasis added).

due to fraud or malice. There is no allegation here of fraud or malice as concerns defendant Hall, or that he was acting outside the scope of his authority or without color of authority. Also, the notice requirements of the Utah Governmental Immunity Act have not been complied with. Accordingly, this court opines and rules that Murray City Attorney Hall is immune from plaintiff's damages claims. In addition, as previously discussed, the said defendant is not subject to a direct lawsuit based upon the Utah Constitution.

Based on the foregoing, it is hereby

ORDERED, Defendants' Motion for Summary Judgment is GRANTED and plaintiff's motions for summary judgment and partial summary judgment are DENIED with respect to claims brought under 42 U.S.C. § 1983 which assert violation of the free exercise of religion, the establishment of religion, the free speech, and the due process clauses of the United States Constitution; it is further

ORDERED, Defendants' Motion for Summary Judgment is GRANTED and plaintiff's motions are DENIED with respect to claims asserted under the Utah State Constitution.

Tab 2

due to fraud or malice. There is no allegation here of fraud or malice as concerns defendant Hall, or that he was acting outside the scope of his authority or without color of authority. Also, the notice requirements of the Utah Governmental Immunity Act have not been complied with. Accordingly, this court opines and rules that Murray City Attorney Hall is immune from plaintiff's damages claims. In addition, as previously discussed, the said defendant is not subject to a direct lawsuit based upon the Utah Constitution.

Based on the foregoing, it is hereby

ORDERED, Defendants' Motion for Summary Judgment is GRANTED and plaintiff's motions for summary judgment and partial summary judgment are DENIED with respect to claims brought under 42 U.S.C. § 1983 which assert violation of the free exercise of religion, the establishment of religion, the free speech, and the due process clauses of the United States Constitution; it is further

ORDERED, Defendants' Motion for Summary Judgment is GRANTED and plaintiff's motions are DENIED with respect to claims asserted under the Utah State Constitution.

Tom SNYDER, Plaintiff,

v.

MURRAY CITY CORPORATION, a Municipal Corporation, and H. Craig Hall, City Attorney for Murray City Corporation, Defendants.

No. 94-CV-667 G.

United States District Court,
D. Utah,
Central Division.

Nov. 2, 1995.

Citizen brought suit against city, contending that city's refusal of his request to present "prayer" at opening portion of city council meeting reserved for nondenominational prayer violated provisions of the United States and Utah Constitutions. After summary judgment was entered in favor of city, 902 F.Supp. 1444, plaintiff moved for new trial and to amend findings and judgment. The District Court, J. Thomas Greene, J., held that: (1) city's refusal to permit plaintiff to deliver his "prayer" at opening "reverence portion" of city council meeting, on ground it represented political commentary, did not violate due process clause of the Utah Constitution; (2) city's prayer policy did not violate the "no public money or property" provision of Utah Constitution because subsidy religion was only indirect; (3) prayer policy did not violate provision of Utah Constitution prohibiting any church from dominating the state or interfering with its functions, because prayer policy did not allow any one religious denomination to dominate or directly interfere with city business; (4) city's prayer policy as applied in instant case did not violate religion clauses of the Utah Constitution because policy as applied was neutral and nondiscriminatory and did not constitute preference for one group or religion over another; and (5) plaintiff's "prayer" was political statement about propriety of public prayer set in framework and language of a prayer, and was akin to parody, and as such was not entitled to protection under religion clauses of the Utah Constitution.

Motion for reconsideration and new trial denied; motion to amend granted in part.

1. Constitutional Law ⇐274.1(5)

City's refusal to permit citizen to deliver proposed "prayer" at "reverence portion" of city council meetings traditionally reserved for a short prayer, on ground that proposed "prayer" constituted political commentary, did not violate due process clause of the Utah Constitution. Const. Art. 1, § 7.

2. Constitutional Law ⇐84.5(1)

Municipal Corporations ⇐92

City's practice of beginning city council meetings with short nondenominational pray-

er in opening "reverence portion" of meeting did not violate the "no public money or property" provision of the Utah Constitution because subsidy of religion was only indirect; nor did practice violate provision of Utah Constitution prohibiting any church [from] dominating the State or interfering with its functions because prayer policy did not allow any one religious denomination to dominate or directly interfere with city business. Const. Art. 1, § 4.

3. Constitutional Law ⇐84.5(1)
Municipal Corporations ⇐92

Application of city's policy of beginning city council meetings with short prayer, which denied citizen's request to present "prayer" on ground that it constituted political commentary, did not violate religion clauses of the Utah Constitution because policy as applied was neutral and nondiscriminatory and did not constitute preference of one group or religion over another. Const. Art. 1, § 4.

4. Constitutional Law ⇐84.5(1)
Municipal Corporations ⇐92

Citizen's proposed "prayer" which he sought to present at opening portion of city council meeting traditionally reserved for short nondenominational prayer was not entitled to protection under the religion clauses of the Utah Constitution, where proposed "prayer" was a political statement about the propriety of public prayer set in the framework and language of a prayer, and was akin to a parody. Const. Art. 1, § 4.

Brian Barnard, John Pace and Joro Walker, Salt Lake City, UT, for plaintiff.

Allan L. Larson and Richard A. Van Wagoner, Salt Lake City, UT, for defendant.

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL AND FOR RECONSIDERATION OF JUDGMENT

J. THOMAS GREENE, District Judge.

This matter is before the court on Plaintiff Tom Snyder's Motion for New Trial and Motion to Amend Findings and Judgment. Defendants have responded to the motions, and plaintiff has filed a reply.[1] This court determines that oral arguments would be of no material assistance, and will decide the pending motions on the basis of the existing record and the recently filed memorandums.

After due consideration, the court denies plaintiff's motion for reconsideration and for new trial, and grants in part the motion to amend by entering the following additional findings of fact and conclusions of law:

Findings of Fact

1. Reference to the State of Utah as intervenor in this action is deleted and the United States is substituted therefor at p. 8, n. 12 of the court's Memorandum Decision and Order dated September 12, 1995. The reference obviously was intended to be the United States rather than the State of Utah.

2. Plaintiff observes that the court addressed plaintiff's claims as though at least in part plaintiff was seeking money damages. Plaintiff's counsel corrects the court by stating that "plaintiff sought no monetary damages under his state law claims," and the court so finds. Accordingly, the court will not further discuss the arguments set forth by plaintiff (Pl.'s Reply Mem. at 4–10) concerning issues of money damages for violation of state constitutional rights and how the Supreme Court of Utah might address such matters in a proper case.

3. All other findings of fact as set forth in the Memorandum Decision and Order dated September 12, 1995, are reaffirmed.

Conclusions of Law

Although most certainly it is here recognized that the Supreme Court of Utah is the final arbiter of state constitutional matters, this court entered its prior Memorandum Decision and Order relative to state law claims only because plaintiff included them for ruling by this court under federal supplemental jurisdiction. In addition to the rulings concerning state constitutional issues entered by this court, and in further support

1. In addition, plaintiff has filed a document entitled "Exhibit Re: Prayers of Episcopal Church."

thereof, this court opines that the Supreme Court of Utah would rule against plaintiff on the merits of the state constitutional claims presented and now sets forth the following conclusions of law:

[1] 1. Murray City's prayer policy is not violative of the due process provision of the Utah Constitution.

The due process provisions of the Utah Constitution and the United States Constitution are similarly worded. In this regard, the Fifth and Fourteenth Amendments to the United States Constitution guarantee that the government shall not "deprive any person of life, liberty, or property, without due process of law ...;" and article I, section 7 of the Utah Constitution states that "No person shall be deprived of life, liberty, or property, without due process of law." In the several cases in which the Utah Supreme Court has discussed the interpretation of the Utah due process provisions, federal case law has been relied upon. *See Terra Utilities, Inc. v. Public Serv. Comm'n*, 575 P.2d 1029, 1033 (Utah 1978) (holding that decisions of the United States Supreme Court regarding the due process guarantees of the United States Constitution "are highly persuasive as to the application of that [due process] clause of our state Constitution").

It therefore appears to the court that Murray City's refusal to permit plaintiff to deliver his "prayer" at the reverence portion of the City Council meetings is not violative of the due process clause of the Utah Constitution for the same reasons that this court has determined no violation to have occurred as to the federal due process clause.

[2] 2. Murray City's prayer policy does not violate the "no public money or property" provision of article I, section 4, nor does it violate the provision prohibiting "any church [to] dominate the State or interfere with its functions."

For purposes of this discussion, this court will assume without deciding that the informal policy of Murray City concerning prayer before the City Council is tantamount to the formal policy of Salt Lake City discussed by the Supreme Court of Utah in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993). As with Salt Lake City's prayer policy, the Murray City policy does not violate the "no public money or property" provision of article I, section 4 because the subsidy of religion is only indirect, nor does it violate the provision prohibiting "any church [to] dominate the State or interfere with its functions" because the prayer policy does not allow any one religious denomination to dominate or directly interfere with city business. *Id.* at 937–38, 939.

[3] 3. Murray City's prayer policy as applied in this case does not violate the remaining religion clauses [2] of the Utah Constitution because such policy as applied is neutral and non-discriminatory and does not constitute a preference of one group or religion over another.

In the case at bar, plaintiff presents an argument that is markedly different from the arguments presented in *Whitehead*. That case concerned a direct challenge to the policy of conducting prayers at the beginning of City Council meetings. By way of contrast, plaintiff does not challenge the Murray City policy of permitting prayer. Instead, plaintiff asserts that once prayer is permitted in City Council meetings, the provisions of article I, section 4 require that the forum for

2. The religion and conscience clauses of the Utah Constitution are found in article I, section 4, which provides:

> The rights of conscience shall never be infringed.
>
> The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof.
>
> There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions.
>
> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.
>
> No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

prayer be open and available to any person or group for any type of purported religious message. In this regard, plaintiff contends that his rights under article I, section 4 were violated when he was denied the opportunity to deliver his "prayer" at the reverence portion of a Murray City Council meeting.[3] In support of this argument, plaintiff cites portions of *Whitehead* which stress the paramount importance of neutrality in interpreting application of the Utah Constitution's religion clauses, such as:

> [I]f government allows all groups to apply for [a] benefit but then discriminates in the selection process, it would be preferring one group over the other in violation of the constitutional principle of neutrality.

Id. at 938. In *Whitehead*, the Court found that "the record indicates no preference by the City Council for any religious group or for organized religion in general." *Id.* at 939.

This court determines that Murray City's prayer policy as applied in rejecting plaintiff's request for permission to deliver his "prayer" in the reverence portion of the City Council meeting is consistent with the aforesaid interpretation of neutrality toward religion.

[4] 4. Plaintiff's proposed "prayer" is not entitled to protection under the religion clauses of the Utah Constitution.

Not every statement that recites the name of a deity or is structured grammatically and semantically in a manner commonly associated with Judeo–Christian prayers automatically qualifies as a religious expression. Plaintiff's "prayer" is a political statement about the propriety of public prayer set in the framework and language of a prayer, and is akin to a parody.

The Supreme Court of Utah has stated that

> [The religion clauses in the Utah Constitution] are designed to protect *religious* exercise and freedom of conscience in general, to separate government from active financial support of religion, to prevent one religion from dominating the public schools or the government itself, and to prevent the imposition of civil limitations based on one's *religious* beliefs or lack thereof.

Id. at 935 (emphasis added). This court opines and holds that a non-religious activity or viewpoint does not gain protection under the religion clauses of the Utah Constitution simply by being masked in the language of religion. This conclusion is consonant with the extensive historical analysis and philosophical discussion concerning article I, section 4 set forth by the Utah Supreme Court in *Whitehead*. In this regard, this court found in its September 12, 1995, Order that "[p]laintiff admittedly is unsure of his religious beliefs, does not adhere to any particular church or group, does not profess any single faith, and has no definitive structure of religious views." *Snyder v. Murray City Corp.*, 902 F.Supp. 1444, 1449, n. 8 (D.Utah 1995). Further, plaintiff has stated: "I don't like public prayer. I don't think it is proper. I disagree with the Utah Supreme Court...." Pl.'s Depo. at 84. Plaintiff voluntarily submitted the text of his "prayer" for review, which was properly determined to be in the nature of a political statement, which plaintiff was allowed to make in the "citizen comment" portion of the City Council meeting.

This court opines that plaintiff's "prayer" is not a religious exercise or activity that is entitled to protection under the religion clauses of article I, section 4 of the Utah Constitution.

For the foregoing reasons, including the additional findings and conclusions set forth herein, plaintiff's motion for new trial and to amend judgment is hereby DENIED.

Counsel for defendants is directed to lodge with the court a form of judgment consistent with this and the court's September 12, 1995,

3. In *Whitehead*, 870 P.2d at 935, the Supreme Court of Utah noted that certain provisions of article I, section 4 "are unique to Utah," but that other provisions at issue in this case "were drawn directly from" the United States Constitution. Despite the similar language, the Court stated that Utah's unique history may effect a "divergent approach" in the interpretation of the Utah Constitution, resulting in "different meanings and different nuances" than the interpretation of the United States Constitution.

Order, after first complying with local rule D.Ut. 206.

NATIONAL PETROLEUM MARKETING, INC., a Nevada Corporation; d/b/a Arizona Fuel Terminal; Sunshine Western, Inc., a Nevada Corporation; John Knight II, and Miller Distributing, Inc., a Nevada Corporation, Plaintiffs,

v.

PHOENIX FUEL CO., INC., an Arizona Corporation; d/b/a Firebird Fuel Co. and Mesa Fuel Co. and Tucson Fuel Co.; Jack Keller and Jane Doe Keller, Husband and Wife, William Wilhoit and Jane Doe Wilhoit, Husband and Wife; United Communications Group, Ltd., a Maryland Limited Partnership, d/b/a Oil Price Information Service and Oil Express; Bruce Levenson, Scott Berhang; Julia Blalock; Carol Donoghue; Mary Welge; The United States of America; and John Does 1–35, Defendants.

Civ. No. 95–CV–296W.

United States District Court, D. Utah. Central Division.

Oct. 6, 1995.

Oil company with its principal place of business in Utah and company's sole shareholder, who was Utah resident, brought action for defamation and related business torts against various nonresidents in connection with preparation and publication of allegedly defamatory article in oil industry print and electronic publications. On motions to dismiss for lack of personal jurisdiction, the District Court, Winder, Chief Judge, held that: (1) all defendants were subject to jurisdiction under Utah long-arm statute; (2) "minimum contacts" remains element of due process test in libel suit; (3) Arizona competitor and its officers, allegedly responsible for providing information used in article, lacked sufficient minimum contacts with Utah; (4) employees of publisher who were not involved in preparation or publication of article in question lacked sufficient minimum contacts with Utah; and (5) publisher and reporter had sufficient minimum contacts with Utah and exercise of personal jurisdiction over them comported with considerations of fair play and substantial justice.

Motions granted in part, denied in part.

1. Federal Courts ⇐76.20

While employee's contacts with jurisdiction are not to be judged according to their employer's activities there in determining whether personal jurisdiction is appropriate, status as employee does not somehow insulate employee from jurisdiction; instead, each defendant's contacts with forum state must be assessed individually.

2. Federal Courts ⇐76.10

In contrast to exercise of general jurisdiction, specific jurisdiction is appropriate only when nonresident contacts with forum state arise from, or are directly related to, cause of action.

3. Constitutional Law ⇐305(5)
Courts ⇐12(2.10)

Evaluation of specific jurisdiction in Utah mandates three-part inquiry: (1) defendant's acts or contacts must implicate Utah under Utah long-arm statute; (2) nexus must exist between plaintiff's claims and defendant's acts or contacts; and (3) application of long-arm statute must satisfy requirements of federal due process. U.S.C.A. Const. Amend. 14; U.C.A.1953, 78–27–24.

4. Federal Courts ⇐76.25

Allegations by corporation with its principal place of business in Utah and shareholders who resided in Utah regarding sources and impact of allegedly defamatory article in print and electronic publications were sufficient to subject all nonresident defendants allegedly involved in either providing information for article or publishing and

Tab 3

At best, then, the record shows no more than that LDL–II briefly made vague, worst-case plans. Even were we to find clear error in the Tax Court's refusal to credit the oral testimony offered, the partnership has not shown that it ever had an objectively realistic prospect of entering the 3100 business. *See Estate of Cook v. Commissioner*, 66 T.C.M. (CCH) 1523 (1993) (recognizing that taxpayers' "understanding that contingency plans existed to exploit the research if the license agreement ... expired or was terminated," insufficient to establish necessary connection to taxpayers' trade or business). Without a far stronger evidentiary showing that the partnership regarded its takeover of the 3100 business as probable, and planned with serious intent for that probability, we cannot conclude that the Tax Court erred in its "realistic prospect" analysis.

IV

[13] Section 174(a)(1) was expressly intended to encourage businesses to carry out research, and we are sympathetic to the view that "[w]ithout R & D partnerships, many of today's new technologies would still be on the drawing board." Robert L. Wolff, *Tax Treatment of Research and Development Limited Partnerships*, 32 Prac. Law. 37, 43 (1986). Certainly, "[t]he uncertain contours of 'trade and business' create opportunities for fair debate." *Levin*, 832 F.2d at 406. Ultimately, however, "[f]air debates about fact-bound matters of characterization are resolved on appeal in favor of the solution the trier of facts reaches." *Id.* Before making any research expenditures, LDL–II negotiated a set of structured agreements that undermined its proprietary control of the completed research, and leave it now unable to overcome the obvious inference that it contractually assumed the role of an investor. AFFIRMED.

Tom SNYDER, Plaintiff-Appellant,

v.

MURRAY CITY CORPORATION, a municipal corporation; H. Craig Hall, City Attorney for Murray City Corporation, Defendants-Appellees.

United States of America, Intervenor.

No. 96-4087.

United States Court of Appeals, Tenth Circuit.

Sept. 10, 1997.

Individual who sought to present prayer during city council meeting filed civil rights action against city council after his prayer was not chosen for reading. The United States District Court for the District of Utah, J. Thomas Greene, J., entered summary judgment in favor of city council, 902 F.Supp. 1444, and individual appealed. the Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that: (1) even assuming that individual was possessed of sincerely held religious beliefs, as expressed in his proposed prayer, city council's refusal to allow individual to speak did not violate free exercise clause of First Amendment; (2) city council did not violate establishment clause; and (3) Court of Appeals would not exercise supplemental jurisdiction over claims under Utah Constitution.

Affirmed in part, reversed in part and remanded.

Briscoe, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Federal Courts ⇐776

Court of Appeals' review of questions of constitutional law and dispositions on summary judgment is de novo.

2. Constitutional Law ⇐84.2

First questions in any First Amendment free exercise claim are whether plaintiff's beliefs are religious in nature, and whether those religious beliefs are sincerely held. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84.2

Only beliefs which are religious in nature are protected by the free exercise clause; nevertheless, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. U.S.C.A. Const. Amend. 1.

4. Federal Civil Procedure ⇐2491.5

Inquiry into sincerity of free-exercise plaintiff's religious beliefs is almost exclusively credibility assessment, and therefore issue of sincerity can rarely be determined on summary judgment. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐84.5(1)
Municipal Corporations ⇐92

Even assuming that individual was possessed of sincerely held religious beliefs, as expressed in his proposed prayer that he wished to present during "reverence" portion of city council meeting, city council's refusal to allow individual to speak did not violate free exercise clause of First Amendment. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐84.1, 84.5(1)

To protect right to believe and possess whatever religious doctrine one desires, free exercise clause prohibits government from impermissibly burdening individual's free exercise of religion; however, free exercise clause should not be understood to require government to conduct its own internal affairs in ways that comport with religious beliefs of particular citizens. U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇐84.5(1)

Free exercise clause does not guarantee any person right to pray whenever and wherever he or she chooses; nor does clause guarantee person right to speak during portions of public meetings set aside for devotional or invocational purposes. U.S.C.A. Const. Amend. 1.

8. Constitutional Law ⇐84.5(1)
Municipal Corporations ⇐92

City did not violate establishment clause when it denied individual permission to give proposed prayer during reverence portion of city council meeting, where prayer disparaged those who believed in propriety of public prayer and was in conflict with city's legitimate objectives in presenting such prayers. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ⇐84.1

Establishment clause assures that government will not favor particular religion, nor religion over nonreligion. U.S.C.A. Const. Amend. 1.

10. Constitutional Law ⇐84.5(1)

Establishment clause does not give any individual right to establish his or her religion by guaranteeing opportunity to pray during public meetings. U.S.C.A. Const. Amend. 1.

11. Federal Civil Procedure ⇐2546

Genuine issues of material facts precluding summary judgment may be founded upon inferences; however, those inferences must be reasonable inferences, and must amount to more than a scintilla of evidence.

12. Federal Courts ⇐18

Court of Appeals would not exercise supplemental jurisdiction over claims under Utah Constitution brought by individual who was denied opportunity to present prayer at city council meeting, where individual's federal claims were resolved prior to trial, and interpretation of state constitutional provisions was evolving. U.S.C.A. Const.Amend 1; Utah Const. Art. 1, §§ 1, 7.

Brian M. Barnard (Andrea Garland and the Utah Legal Clinic, with him on the briefs), Cooperating Attorneys for Utah Civil Rights & Liberties Foundation, Inc., Salt Lake City, UT, for Plaintiff-Appellant.

Allan L. Larson (Richard A. Van Wagoner, with him on the brief), Snow, Christensen & Martineau, Salt Lake City, UT, for Defendants-Appellees.

Before KELLY, HOLLOWAY, and BRISCOE, Circuit Judges.

PAUL KELLY, Circuit Judge.

Plaintiff Tom Snyder appeals from the district court's grant of summary judgment in favor of Defendants Murray City and H. Craig Hall, the City Attorney of Murray City. In his 42 U.S.C. § 1983 action, Mr.

Snyder alleged that Murray City's refusal to permit him to speak during the reverence portion of a Murray City Council meeting violated his rights under the United States Constitution. He also alleged violations of the Religious Freedom Restoration Act and the Utah Constitution. The talk Mr. Snyder desired to present—which he characterizes as a prayer and the City characterizes as a diatribe against City officials [1]—requests the "Mother in Heaven" to cause the cessation of prayers at public meetings. We exercise jurisdiction under 28 U.S.C. § 1291, and affirm in part and reverse in part.

Background

Since 1982, Murray City has opened its city council meetings with a reverence period, during which an invocation or devotional is presented. The reverence portion of the meetings is designed to encourage lofty thoughts, promote civility, and cause the participants to set aside other matters in order to focus on the topics to be addressed at the meeting. The city council extends invitations to speak during the reverence period to individuals representing a broad cross-section of religious faiths, and invocations or devotionals have been presented at the Murray City Council meetings by Christians, Navajos, Quakers, and Zen Buddhists. One speaker simply requested a moment of silence. Mr. Snyder, who does not reside in Murray City, wrote to the City, advising of his interest in presenting a prayer at a council meeting. Mr. Snyder attached his two-page proposed "Opening Prayer" to the letter.[2] Mr. Snyder's request was part of his personal campaign to stop prayers at public meetings, waged in response to a recent decision of the Supreme Court of Utah which upheld Salt Lake City's practice of opening public meetings with a prayer.

Although Mr. Snyder was reared as a member of the Church of Jesus Christ of Latter-Day Saints, he is no longer a practicing member of that faith, or any other organized religion. He testified that he considers himself deeply religious, but is not yet sure what his beliefs are, and leans towards agnosticism. Mr. Snyder cites the Book of

1. We recognize that the parties disagree over whether Mr. Snyder's proposed speech was a prayer and whether Murray City denied his request. The City's letter to Mr. Snyder informed him that, until his "proposed prayer satisfies [the City's] guidelines, an invitation to participate in our opening ceremonies will not be forthcoming." The City also advised Mr. Snyder that he could request a place on the meeting agenda or voice his thoughts during the citizen comment portion of the meeting. For ease of reference, however, we adopt the terminology used by the parties and refer to Mr. Snyder's talk as a prayer and the City's action as a denial of his request to deliver his prayer.

2. Mr. Snyder's proposed prayer read as follows:

OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a God that takes a woman's form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

We fervently ask that you guide the leaders of this city, Salt Lake County and the State of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats' decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings;

We ask that you grant Utah's leaders and politicians enough courage and discernment to understand that religion is a private matter between every individual and his or her deity; we beseech thee to educate government leaders that religious beliefs should not be broadcast and revealed for the purpose of impressing others; we pray that you strike down those that mis-use your name and those that cheapen the institution of prayer by using it for their own selfish political gains;

We ask that the people of the State of Utah will some day learn the wisdom of the separation of church and state; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our Gods;

We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the State of Utah by the actions of mis-guided, weak and stupid politicians, who abuse power in their own self-righteousness;

All of this we ask in thy name and in the name of thy son (if in fact you had a son that visited earth) for the eternal betterment of all of us who populate the Great State of Utah.

Amen.

Mormon and the Gospel of St. Matthew as the religious bases for his prayer. He believes that prayer should be a private matter between an individual and his or her God, and that Jesus Christ opposed public prayers, including those before government meetings. Although Mr. Snyder testified at his deposition that he believes in God, he also testified that he questions God's existence.

On behalf of Murray City, Mr. Hall responded to Mr. Snyder's request and informed him that his proposed prayer was unacceptable because it did not follow the guidelines for prayers which the City had previously provided to Mr. Snyder. Although the council had no formal, written policy, Mr. Snyder had been informed by letter prior to the submission of his proposed prayer that "the purpose of the 'prayer' is to allow individuals [the] opportunity to express thoughts, leave blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies." Mr. Snyder had also been advised that comments on City practices and policies could be made during city council meetings either by requesting a place on the meeting agenda or by speaking during the citizen comment portion of the meeting. The citizen comment portion of the meeting immediately follows the reverence portion.

Mr. Snyder filed this § 1983 action upon receiving in the mail Murray City's denial of his request to give a prayer. He alleges that the City's refusal of his request violated his rights under the United States and Utah Constitutions to free exercise of his religion and to due process. Mr. Snyder also alleges violations of the Establishment Clause of both Constitutions, and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb–4. Both Defendants and Mr. Snyder moved for summary judgment, which the district court granted in favor of the Defendants and denied to Mr. Snyder, who brings this appeal.

Discussion

[1] Our review of questions of constitutional law and dispositions on summary judgment is de novo. *United States v. One Parcel Property*, 106 F.3d 336, 338 (10th Cir. 1997).

I. Claims Under the United States Constitution

Mr. Snyder brings this action under 42 U.S.C. § 1983. To prevail in a § 1983 claim, a plaintiff must establish that the defendants, while acting under color of state law, deprived him of a right, privilege, or immunity secured by the United States Constitution. We therefore consider whether Murray City's denial of Mr. Snyder's request to deliver his proposed prayer during the reverence portion of a city council meeting violated his rights under the Free Exercise, Establishment, or Due Process Clauses of the Federal Constitution.

In his briefs, Mr. Snyder relies upon case law interpreting the Free Speech Clause of the First Amendment. Since he did not allege a violation of his right to free speech, however, we need not consider the arguments raised under that body of law.

A. *Free Exercise Claim*

[2, 3] The first questions in any free exercise claim are whether the plaintiff's beliefs are religious in nature, and whether those religious beliefs are sincerely held. *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863–64, 13 L.Ed.2d 733 (1965). Only beliefs which are religious in nature are protected by the Free Exercise Clause. Nevertheless, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981).

[4] Although Mr. Snyder swore out affidavits attesting to his sincerity, the district court held that he was not sincere in the beliefs espoused in his proposed prayer. The district court reached this conclusion based upon the text of Mr. Snyder's prayer, which the court found to contain political instead of religious content, and on Mr. Snyder's deposition testimony that he was unsure of his religious beliefs. The inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment, *see Seeger*, 380 U.S. at 186, 85

S.Ct. at 864; *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir.1991), and therefore the issue of sincerity can rarely be determined on summary judgment. This may well be, however, one of those very rare cases in which the plaintiff's beliefs are "so bizarre, so clearly nonreligious in motivation" that they are not entitled to First Amendment protection. *Thomas*, 450 U.S. at 715, 101 S.Ct. at 1431.

[5] Regardless, we need not decide whether Mr. Snyder's beliefs are religious in nature nor whether they are sincerely held. Nor need we address Mr. Snyder's argument that summary judgment was inappropriate. Even assuming that Mr. Snyder is possessed of sincerely held religious beliefs, as articulated in his proposed prayer, we find that Mr. Snyder's claim is not cognizable under the Free Exercise Clause. In fact, Mr. Snyder's arguments evince a fundamental misconception about the rights bestowed by the Clause.

[6] The Free Exercise Clause is one of the Bill of Rights's "thou shall not" prohibitions against certain government actions. The Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert v. Verner*, 374 U.S. 398, 412, 83 S.Ct. 1790, 1798, 10 L.Ed.2d 965 (1963) (Douglas, J., concurring). To protect "the right to believe and profess whatever religious doctrine one desires," *Employment Div. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 1599, 108 L.Ed.2d 876 (1990), the Free Exercise Clause prohibits the government from impermissibly burdening an individual's free exercise of religion. However, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699, 106 S.Ct. 2147, 2152, 90 L.Ed.2d 735 (1986).

[7] The Free Exercise Clause does not guarantee any person the right to pray whenever and wherever he chooses. Nor does the Clause guarantee a person the right to speak during portions of public meetings set aside for devotional or invocational purposes. Suggestion to the contrary is inconsistent with both common sense and constitutional doctrine. *Cf. Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). We find no violation of the Free Exercise Clause.

B. *Establishment Clause Claim*

[8–10] Mr. Snyder claims that Murray City's denial of his request to speak at the reverence portion of its city council meeting violated the Establishment Clause. This argument also misapprehends the protections afforded by that Clause. The Establishment Clause assures that the government will not favor a particular religion, nor religion over nonreligion. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703, 114 S.Ct. 2481, 2491, 129 L.Ed.2d 546 (1994). Like the Free Exercise Clause, the Establishment Clause is a prohibition against certain government actions. The Establishment Clause does not give any individual the right to establish his religion by guaranteeing an opportunity to pray during public meetings, and certainly does not require Murray City to permit all comers to speak during the reverence portion of its city council meetings.

In *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), the Supreme Court upheld the constitutionality of opening governmental meetings with prayers. The Court observed that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786, 103 S.Ct. at 3333. "To invoke Divine guidance on a public body entrusted with making the laws is not ... an 'establishment' of religion or a step toward establishment...." *Id.* at 792, 103 S.Ct. at 3336.

[11] Mr. Snyder does not argue that Murray City's practice of opening its city council meetings with prayer violates the Establishment Clause. *Marsh* appears to foreclose such an argument. Instead, Mr. Snyder argues that Murray City violated the

Establishment Clause by permitting others to pray, yet denying him the same opportunity. *Marsh* suggests that a governmental body's practices in selecting persons to deliver prayers at public meetings may violate the Establishment Clause if the selections are the product of impermissible motives. *Id.* at 793, 103 S.Ct. at 3337. The record in this matter is devoid of evidence suggesting that Murray City had impermissible motives either in extending invitations to speak, or in denying Mr. Snyder's request.[3] Similarly absent is any suggestion that Murray City used the reverence portion of its city council meetings to advance a particular faith or to disparage any faith or belief. *See id.* at 794–95, 103 S.Ct. at 3337–38. In contrast, Mr. Snyder's prayer itself disparages those who believe in the propriety of public prayer. Clearly, the content of Mr. Snyder's prayer is in conflict with the City's legitimate objectives in presenting such prayers. *Marsh* controls the issue before us, and we find no violation of the Establishment Clause.

C. *Due Process Claim*

Because Mr. Snyder's First Amendment claims are without merit, his claim under the Federal Due Process Clause also fails. It is beyond argument that process is due only when the government terminates a protected interest. *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Mr. Snyder was not deprived of any protected interest and therefore he had no entitlement to any sort of process.

II. Religious Freedom Restoration Act Claim

Mr. Snyder appeals from the district court's adverse decision on his RFRA claims. Since this case was argued, however, the Supreme Court has held RFRA unconstitutional. *City of Boerne v. Flores*, — U.S. —, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). We therefore need not consider the merits of Mr. Snyder's RFRA claims.

III. Claims Under the Utah Constitution

[12] Mr. Snyder also alleges that the City's denial of his request violates the Free Exercise, Establishment, and Due Process Clauses of the Utah Constitution. Although the district court did not reach the merits of these state-law claims, it ruled against Mr. Snyder, finding that the provisions of the Utah Constitution were not "self-executing" and therefore did not provide a cause of action.

We have held that when federal claims are resolved prior to trial, the district court should usually decline to exercise jurisdiction over pendent state law claims and allow the plaintiff to pursue them in state court. *See Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995). We believe this general practice is particularly appropriate in this case.

The Supreme Court of Utah recently rejected a challenge to Salt Lake City's practice of opening its city council meetings with a prayer. *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993). While that challenge was brought under the provision of Utah's Constitution which prohibited the expenditure of public monies for religious purposes and not under its Free Exercise or Establishment Clauses, the Supreme Court of Utah stated in *Society of Separationists* that it would not follow federal constitutional models in interpreting the Religion Clauses of the Utah Constitution. *Id.* at 930, 931 n. 36. Given that the interpretation of those Clauses appears to be undergoing an evolution, and given the complex issues of state

3. Conceding that no actual evidence of improper motive exists, the dissent attempts to create a material issue of fact sufficient to justify a trial by citing a collection of supposed inferences. Dissent at 1358. A mere demonstration that the City denied Mr. Snyder's request because of the content of his prayer does not prove a violation of the Establishment Clause. To survive the motion for summary judgment, Mr. Snyder was required to produce evidence from which reasonable jurors could find by a preponderance of the evidence that the City had an impermissible motive. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986); in other words, that the City denied Mr. Snyder's request because it preferred another religion, or nonreligion, over his religion. Genuine issues of material facts may be founded upon inferences; however, those inferences must be *reasonable* inferences, and must amount to more than a scintilla of evidence. *Id.*; *see also Black v. Baker Oil Tools*, 107 F.3d 1457, 1460 (10th Cir.1997). Even assuming that a collection of inferences can create a genuine issue of material fact, this record cannot reasonably be considered to have created such an issue.

law presented, we decline to exercise supplemental jurisdiction over Mr. Snyder's state-law claims.

We therefore reverse as to the state-law claims and remand them to the district court with instructions to dismiss without prejudice.

AFFIRMED in part, REVERSED in part, and REMANDED to the district court.

BRISCOE, Circuit Judge, concurring and dissenting:

Federal Free Exercise Claim

I concur with the majority's conclusion that Snyder failed to establish a federal free exercise claim. I agree that the Free Exercise Clause did not guarantee Snyder the right to give his prayer as the opening prayer at city council meetings, and that by excluding Snyder's prayer the City did not impermissibly burden Snyder's right to believe and profess his religious doctrines. His claim is not cognizable under the Free Exercise Clause.

However, I disagree with any suggestion that Snyder's claim could be rejected at the summary judgment stage on the ground that his beliefs are not religious in nature. In reviewing the grant of summary judgment, we examine the factual record and reasonable inferences drawn from it in the light most favorable to the party opposing summary judgment. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir.1996). The record contains evidence that the beliefs expressed in Snyder's prayer have a religious basis, and whether religious beliefs are sincerely held is a question of fact. *Mosier v. Maynard*, 937 F.2d 1521, 1523 (10th Cir.1991). *See United States v. Seeger*, 380 U.S. 163, 176, 85 S.Ct. 850, 859, 13 L.Ed.2d 733 (1965). The record does not support a conclusion that the beliefs expressed by Snyder are so bizarre or so clearly nonreligious in nature that the district court could properly resolve the issue on summary judgment.

Religious Freedom Restoration Act Claim

I concur with the majority's conclusion that after *City of Boerne v. Flores*, — U.S. —, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), we need not consider the merits of Snyder's Religious Freedom Restoration Act claim. The Court held in *Boerne* that RFRA's restrictions on state and local government actions affecting religion are unconstitutional.

Claims under Utah Constitution

I also concur with the majority's conclusion that it was an abuse of discretion for the district court to exercise supplemental jurisdiction to decide the delicate state constitutional issues. We cannot predict from *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), how the Utah Supreme court would decide the state constitutional issues in this case.

Federal Establishment Clause Claim

I respectfully dissent from the majority's conclusion that Snyder's federal Establishment Clause claim is precluded by *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). There are significant differences between this case and *Marsh*. The sole issue in *Marsh* was whether the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the state violated the Establishment Clause. Using a purely historical analysis, the Court concluded the practice did not establish religion in violation of the First Amendment. The Court reasoned the practice did not establish religion within the meaning of the First Amendment because the First Congress that drafted the Bill of Rights hired chaplains to give prayers at sessions of Congress. The practice of opening legislative sessions with prayer by a chaplain paid by the government is not an establishment of religion within the meaning of the First Amendment, but "is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792, 103 S.Ct. at 3336.

Here, the City did not hire or appoint a chaplain as its official religious spokesperson, which was the sole practice at issue in *Marsh*. Instead, the City sponsored a forum for private individuals to engage in prayer at city council meetings and excluded Snyder from that forum because of the content of his prayer. Snyder does not challenge the City's practice of sponsoring prayer at its council

meetings. He challenges only his exclusion from the City-sponsored forum for prayer based on the unacceptable content of his proposed prayer.

Marsh is distinguishable from this case for three reasons. First, the historical record does not support censorship of prayer by private individuals at the start of government meetings. Second, prayer by private individuals at the start of meetings of governmental bodies is fundamentally different from prayer by a chaplain who is appointed as the official paid religious spokesperson for the governmental body. Third, the record contains circumstantial evidence that the City had impermissible motives for excluding Snyder's prayer.

Although from *Marsh* we know the members of the First Congress who drafted the First Amendment believed appointment of chaplains did not violate the Establishment Clause, we simply do not know what they would have thought about censorship of prayer at a government-sponsored forum for prayer by individuals at the start of meetings of a legislative body. The censorship of chaplains' prayers at government meetings does not find support in the actions of the First Congress. Research reveals no historical record of the prayers offered by the chaplains of the First Congress. The record of debates and proceedings in the first eighteen congresses in the *Annals of Congress* do not include chaplains' prayers [1] and, other than the decision of the First Congress to appoint two chaplains of different denominations, one by each house to interchange weekly, *see 1 Annals of Congress* 968, 1077, 1773, there appears to be no record of the measures, if any, taken by Congress to control the content of such prayers.

Marsh suggests that chaplains' prayers could be censored without violating the Constitution. The Court suggested that to be lawful, a legislative chaplain's prayer must be nonsectarian and non-proselytizing:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794–95, 103 S.Ct. at 3337–38.

Conversely, the content of sectarian, proselytizing prayer by a legislative chaplain would be of concern to the courts as a possible establishment of religion. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 603, 109 S.Ct. 3086, 3106, 106 L.Ed.2d 472 (1989). Such prayer by a legislative body's official religious spokesperson could reasonably be viewed as governmental endorsement of a particular religion in violation of the Establishment Clause. Consequently, it may not violate the Establishment Clause for a government official to determine whether a chaplain's prayers are sufficiently nonsectarian and nonproselytizing in order to avoid violating the Establishment Clause. Censorship or control of the content of a legislative chaplain's prayers could be justified only by the need to avoid violating the Establishment Clause by keeping the prayers within the limits allowed by *Marsh*.

It is true Snyder's proposed prayer was proselytizing in nature because it was intended to convert listeners to his point of view on the impropriety of prayer at a governmental function. It is also true that although Snyder was not a member of any organized religious sect, his prayer was sectarian in the sense that it represented his particular beliefs and did not attempt to encompass shared beliefs. However, Snyder is not a chaplain hired or appointed to be the City's official religious spokesperson. The prayers at the start of the city council meetings are not offered by a chaplain, but by members of the public representing a broad range of religious beliefs. The Establishment Clause's guarantee of government neutrality toward religion is not offended, but respected, when the government, following neutral criteria and evenhanded policies, gives access to a forum to recipients whose ideologies and viewpoints, including religious ones, are

1. Nor does the *Congressional Globe*, which covers the mid-19th century. The opening prayers of congressional chaplains were not recorded in the Congressional Record from its start in 1873 until the early twentieth century.

broad and diverse. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 837-39, 115 S.Ct. 2510, 2521, 132 L.Ed.2d 700 (1995). *See also Board of Education v. Mergens*, 496 U.S. 226, 248-49, 110 S.Ct. 2356, 2370-71, 110 L.Ed.2d 191 (1990); *Widmar v. Vincent*, 454 U.S. 263, 277, 102 S.Ct. 269, 278, 70 L.Ed.2d 440 (1981). If the City permitted Snyder to offer his prayer, a reasonable observer aware of the City's practice of inviting persons representing a broad range of religious and non-religious viewpoints to give invocations would not regard Snyder's prayer as representing the City's endorsement of his particular beliefs. Consequently, permitting the prayer would not have violated the Establishment Clause. *See Rosenberger*, 515 U.S. at 842-43, 115 S.Ct. at 2523; *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 768-70, 115 S.Ct. 2440, 2450, 132 L.Ed.2d 650 (1995); *Mergens*, 496 U.S. at 250-51, 110 S.Ct. at 2372; *see also Capitol Square*, 515 U.S. at 779-81, 115 S.Ct. at 2455 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 636, 109 S.Ct. at 3123-24 (O'Connor, J., concurring). Because permitting Snyder's prayer would not have violated the Establishment Clause, justification for permitting governmental censorship or control of the content of chaplain's prayers suggested by *Marsh* is not present here.

Marsh also suggests that a governmental body's selection of persons to deliver prayers at its meetings may violate the Establishment Clause if the selections are the product of impermissible motives. I disagree with the majority's conclusion that the record is devoid of evidence suggesting the City had impermissible motives in denying Snyder's request to offer his prayer. I do not, as footnote 3 of the majority opinion asserts, concede there is no *actual* evidence of impermissible motive. There is no *direct* evidence, but there is circumstantial evidence of impermissible motive. Direct evidence of discriminatory intent is rarely available, and it is not a novel proposition to say that intent may be proved by circumstantial evidence. *See, e.g., Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1420 (10th Cir.1991). Viewed in the light most favorable to Snyder, the record supports an inference that the guidelines were drafted specifically to exclude Snyder's prayer because its content was offensive.

Snyder wrote to the City in March 1994, expressing interest in presenting a prayer at a council meeting and asking if there were any guidelines or restrictions on such prayers. Snyder received no reply and wrote again in May, again expressing interest in presenting a prayer and inquiring about any guidelines or restrictions. His request was forwarded to H. Craig Hall, City Attorney of Murray City, who answered Snyder's letter on June 1, 1994.

The City had no formal, written guidelines or restrictions on prayers before council meetings until Snyder asked if there were any. Persons asked to give invocations were simply asked to give an "invocation, appropriate message, or inspirational thought." (Appellant's append. at 281.) According to Hall, since the prayers began in 1982, a custom and practice of "positive, upbeat" prayers "exhorting the City Council to do what they ought to do under their statutory responsibilities" had developed. No one had ever attacked City policies or the council during an invocation.

By the time Snyder made his request, the City Council of Salt Lake City had decided not to have prayer at the opening of council meetings rather than deal with a request by Snyder that he be permitted to deliver a prayer virtually identical to the prayer at issue in this case. Snyder's prayer was likely to offend a great many people of a variety of Christian faiths on religious grounds. The prayer questions the divinity of Jesus and the existence of heaven, and expresses a belief that God may take the form of a woman. These views are controversial, to say the least. Snyder's proposed prayer and the decision of the Salt Lake City Council were reported in the newspapers. Hall had read newspaper articles about Snyder's request to present the prayer at a Salt Lake City Council meeting, and this knowledge influenced his response to Snyder's request. The record establishes that Hall believed (correctly, as it turned out) Snyder would propose a similar or identical prayer to Murray City, and he drafted his response to exclude the expected prayer. This response

constituted the City's first written or unwritten guidelines for prayer at council meetings. In his letter to Snyder, Hall stated that acceptable invocations, inspirational messages, or prayers must not "express political views, attack City policies or practices or mock City practices or policies." (Appellant's append. at 10.) In his deposition, however, he said that not all political views are prohibited; apparently only views critical of the council or its policies and practices.

Upon receiving Hall's response, Snyder sent a copy of his prayer and a request that he be permitted to offer it at a council meeting. On June 30, Hall responded with a letter stating the text of the proposed prayer was "unacceptable" under the guidelines set out in his letter of June 1. (Appellant's append. at 14.) The next month, the City invited the pastor of a local church to deliver an invocation and the invitation made no mention of any guidelines or restrictions.

The record would support inferences that the City had no restrictions on the content of prayers until Snyder made his request, that the restrictions were drafted specifically to exclude Snyder's prayer, and that the restrictions were not applied to others. Although there was evidence the City had the permissible motive of promoting civility, and although there was no direct evidence of impermissible motives, the circumstantial evidence is sufficient to support an inference that the City acted to exclude Snyder's prayer because it found the content offensive. Because the record contains evidence the City acted with impermissible motives, *Marsh* cannot justify entry of summary judgment for the City.

Because *Marsh* is not controlling, determining whether the City's exclusion of Snyder based on the content of his prayer violates the Establishment Clause requires further analysis. The long-standing test for determining whether government action violates the Establishment Clause first set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), has been modified in recent cases. Under the *Lemon* test, government action regarding religion violates the Establishment Clause unless it meets three conditions: (1) It must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. The Court has in some cases recast the first and second parts of the *Lemon* test to ask whether the challenged government action was intended to endorse or disapprove, or has the effect of endorsing or disapproving, religion. *See County of Allegheny*, 492 U.S. at 592–93, 109 S.Ct. at 3100–01; *Lynch v. Donnelly*, 465 U.S. 668, 687–94, 104 S.Ct. 1355, 1366–70, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring); *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir.1995), *cert. denied* — U.S. —, 116 S.Ct. 1702, 134 L.Ed.2d 801 (1996). In *Agostini v. Felton*, — U.S. —, — — —, 117 S.Ct. 1997, 2014–16, 138 L.Ed.2d 391 (1997), the Court explained that entanglement is properly understood as an aspect of an inquiry into the effect of the government action rather than as a separate factor in the test.

The stated purpose for the City's exclusion of Snyder's prayer was secular—to promote civility at city council meetings. However, as discussed above, the record supports an inference that the City drafted its prayer guidelines and applied them only to Snyder because it found the content of his prayer offensive. On this record, whether the stated purpose was a pretext for impermissible motives is a question of fact. The exclusion of Snyder's prayer also had the effect of expressing disapproval of his religious views. A reasonable observer familiar with the City's practices could conclude from exclusion of the prayer that the City disapproved of Snyder's beliefs. *See Chandler v. James*, 958 F.Supp. 1550, 1566 (M.D.Ala.1997).

The City's censorship of the content of the prayer also constitutes excessive entanglement. Governmental monitoring and control of the content of prayer inevitably establishes religion by entangling the government in religious issues. "[R]eview of prayers by government officials is one of the very practices which the First Amendment was designed to prevent. The framers knew that government involvement with one's religious practices would inevitably taint the sanctity of one's faith." *Chandler*, 958 F.Supp. at

1566 (holding statute permitting student-led, nonsectarian, nonproselytizing prayer in public schools unconstitutional). *See also Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 279 (5th Cir.), *cert. denied* — U.S. —, 117 S.Ct. 388, 136 L.Ed.2d 304 (1996). In *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the Court held prayer at a high school graduation by a clergyman invited by the principal violated the Establishment Clause. The Court did not apply the *Lemon* or endorsement tests, but focused on the susceptibility of high school students to coercion. However, the Court in effect found excessive entanglement in concluding the principal's control over the content of the prayer offended the Establishment Clause. The Court concluded: "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government,' and that is what the school officials attempted to do." 505 U.S. at 588, 112 S.Ct. at 2656 (quoting *Engel v. Vitale*, 370 U.S. 421, 425, 82 S.Ct. 1261, 1264, 8 L.Ed.2d 601 (1962)).

Similarly, in *Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863, 281 Cal.Rptr. 34, 809 P.2d 809 (1991), *cert. denied* 505 U.S. 1218, 112 S.Ct. 3026, 120 L.Ed.2d 897 (1992), the court held a school district's attempt to control the content of high school graduation prayers constituted excessive entanglement. "To allow preventive monitoring by the state of the content of religious speech inevitably leads to gradual official development of what is acceptable public prayer. 'This result is as contrary to the requirements of the Establishment Clause as is ... composition of an official state prayer.'" 281 Cal.Rptr. at 43, 809 P.2d at 818 (quoting *Weisman v. Lee*, 728 F.Supp. 68, 74 (D.R.I.1990), *aff'd* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)).

Courts that have rejected Establishment Clause challenges to state and local legislative prayer have also recognized the risk of excessive entanglement even as they upheld the practice in general. In *Bogen v. Doty*, 598 F.2d 1110 (8th Cir.1979), the court rejected an Establishment Clause challenge to a county board's practice of opening meetings with prayer by an unpaid local clergyman. However, the court stated:

> We would be less than candid if we did not warn the county of the quagmire it is near. Up to the time of oral argument, all persons delivering invocations were members of the Christian faith. We have no reason to believe that persons of any religious persuasions have volunteered and been turned down by the board. If in the future this should occur the board will be in a very difficult position to defend against an allegation that it is excessively entangled in religion by giving public approval to some groups while denying it to others.

598 F.2d at 1114. In upholding a statute authorizing the use of public funds to pay salaries of chaplains for the state legislature, the Massachusetts Supreme Court noted:

> There is no evidence that a great degree of government entanglement with religion is occasioned by the employment of legislative chaplains. The prayers offered are brief, *the content unsupervised by the State*, and attendance completely voluntary. There is *no evidence that the State has become embroiled in any difficult decisions about which religions are to be represented or what sorts of invocations are to be offered.*

Colo v. Treasurer and Receiver General, 378 Mass. 550, 392 N.E.2d 1195, 1200 (1979) (emphasis added). *See Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799, 800 (1968); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888, 901 (1981) (Pashman, J., concurring).

Not all government oversight of religious activities violates the Establishment clause—the entanglement must be excessive. Although mere custodial oversight of religious activities at a government-sponsored forum does not constitute excessive entanglement, *see Mergens*, 496 U.S. at 253, 110 S.Ct. at 2373, the censorship of prayer goes far beyond mere custodial oversight, and strikes at the heart of the Establishment Clause. Moreover, if the City applied its guidelines to all prayers at council meetings, the censorship would be regular and frequent. In *Lemon*, 403 U.S. at 620, 91 S.Ct. at 2114–15, the Court held state aid to parochial schools

violated the Establishment Clause because of the monitoring required to ensure that teachers paid with public funds did not teach religion. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected.... These prophylactic contacts will involve excessive and enduring entanglement between state and church." Here, if Murray City were to consistently apply its prayer guidelines and review all prayers before its meetings, the city attorney would have to censor prayers approximately thirty-six times a year.

I recognize that the invocation ceremony at the start of city council meetings is not a public forum open for indiscriminate public speech by the general public. It is a limited forum from which the government may exclude a speaker who wishes to address a topic not encompassed within the purpose of the forum, although it cannot exclude a speaker solely to suppress a point of view espoused on an otherwise includible subject. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985). *See Rosenberger*, 515 U.S. at 827–31, 115 S.Ct. at 2516–17; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392–94, 113 S.Ct. 2141, 2147–48, 124 L.Ed.2d 352 (1993). The City limited the forum to speech appropriate for an invocation ceremony. The stated purpose of the invocation ceremony was to promote civility, solemnize the occasion, and encourage concentration on the matters on the agenda by appropriate inspirational messages, including prayers. When confronted with a prayer it deemed inappropriate for the invocation, the City drew up guidelines prohibiting prayer expressing political views or attacking or mocking City policies and practices. Such prayer would not tend to promote civility or solemnize the occasion.

The City could not properly exclude prayer attacking or mocking the city council or its policies and practices unless it also excluded prayer defending or supporting the council and its policies and practices. Otherwise, it would be allowing prayer on political matters, but from only one point of view. The guidelines purported to exclude all prayer expressing political views, but the record indicates some political views were permitted, and the record would support an inference that the City drafted its guidelines specifically to exclude Snyder's religious views.

Moreover, even neutral exclusion of all prayer expressing political views would violate the Establishment Clause. The City specifically invited religious speech in the form of prayer. Neutral enforcement of the rule prohibiting prayer expressing political views would entangle the City in religion by requiring censorship of prayer. It could also convey a message of governmental disapproval of religions whose adherents feel compelled to address political issues.

Procedural Due Process Claim

Because in my view, the district court erred in entering summary judgment against Snyder's federal Establishment Clause claim, I also dissent from the majority's conclusion that because Snyder was not deprived of any protected interest, his due process claim fails.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael Demetrius KNOX, also known as Michael Asberry,
Defendant-Appellant.

United States Court of Appeals,
Tenth Circuit.

Sept. 17, 1997.

Defendant was convicted in the United States District Court for the Northern District of Oklahoma, Terry C. Kern, J., of mail fraud and conspiracy to commit mail fraud, and defendant appealed. The Court of Appeals, Lucero, Circuit Judge, held that: (1) witnesses' prior statements at their own

Tab 4

Tom SNYDER, Plaintiff-Appellant.

v.

MURRAY CITY CORPORATION, a municipal corporation; H. Craig Hall, City Attorney for Murray City Corporation, Defendants-Appellees.

United States of America, Intervenor.[1]

No. 96-4087.

United States Court of Appeals, Tenth Circuit.

Oct. 27, 1998.

Plaintiff who sought to present prayer during city council meeting filed civil rights action against city council after his prayer was not chosen for reading. The United States District Court for the District of Utah, J. Thomas Greene, J., 902 F.Supp. 1444, entered summary judgment for city council, and plaintiff appealed. The Court of Appeals, 124 F.3d 1349, initially affirmed the district court's resolution of federal claims. On rehearing en banc, the Court of Appeals, Ebel, Circuit Judge, held that city council did not violate Establishment Clause by denying citizen permission to recite his proposed prayer.

Affirmed and remanded.

Lucero, Circuit Judge, concurred in judgment and filed opinion.

Briscoe, Circuit Judge, filed dissenting opinion in which Seymour, Circuit Judge, joined.

1. Constitutional Law ⇐84.5(1)

"Legislative prayer" in opening session does not violate Establishment Clause. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐84.5(1)

Legislative body does not violate Establishment Clause when it chooses particular person to give its invocational prayers; similarly, there can be no Establishment Clause violation merely in fact that legislative body chooses not to appoint certain person to give its prayers. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84.5(1)

The kind of legislative prayer that will run afoul of Establishment Clause is one that proselytizes particular religious tenet or belief, or that aggressively advocates specific religious creed, or that derogates another religious faith or doctrine. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐84.5(1)

There is no "impermissible motive" under Establishment Clause when legislative body or its agent chooses to reject government-sanctioned speaker because prayer tendered by him for legislative invocation falls outside long-accepted genre of legislative prayer. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐84.5(1)

Municipal Corporations ⇐92

City council did not violate Establishment Clause by denying citizen permission to recite his proposed prayer at opening of council meeting, where proposed prayer explicitly attacked genre of legislative invocational prayer, disparaged those who believed that legislative prayer was appropriate and aggressively proselytized for citizen's particular religious views. U.S.C.A. Const.Amend. 1.

Brian M. Barnard (Andrea Garland of the Utah Legal Clinic, with him on the briefs), Cooperating Attorneys for Utah Civil Rights & Liberties Foundation, Inc., Salt Lake City, Utah, for Plaintiff-Appellant.

Allan L. Larson (Richard A. Van Wagoner, with him on the brief) Snow, Christensen & Martineau, Salt Lake City, Utah, for Defendants-Appellees.

1. The government intervened in this case in the district court solely for the purpose of defending the constitutionality of the Religious Freedom Restoration Act of 1993. The government did not participate in the initial appeal of this case and did not participate in this en banc rehearing. Thus, although the government remains named in the caption of this case, it is not a party to the appeal.

Before SEYMOUR, Chief Judge, HOLLOWAY, Senior Circuit Judge, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, and MURPHY, Circuit Judges.

EBEL, Circuit Judge.

This court has agreed to rehear this case en banc [2] to consider whether the Establishment Clause of the First Amendment prevents a city council from denying a request from a private citizen to give a prayer at the opening of the council's meeting when the denial is made on the basis of the content of the proposed prayer. The Supreme Court of the United States has previously held in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), that the United States Constitution is not violated if a legislative or other deliberative body chooses to speak prayerfully when it opens its meetings. Applying *Marsh*, we now hold that no violation of the Establishment Clause arises when a city chooses who may offer the invocational prayer to open a city council meeting.

Background

The background of this case is reported in the district court and original panel opinions, *see Snyder v. Murray City Corp.* 902 F.Supp. 1444 (D.Utah 1995) ["*Snyder I*"] and *Snyder v. Murray City Corp.*, 902 F.Supp. 1455 (D.Utah 1995) ["*Snyder II*"], *aff'd in part & rev'd in part, Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir. 1997) ["*Snyder III*"]. We provide only those details that are germane to the Establishment Clause issue that we deal with here.

In 1993, the Utah Supreme Court held that the religion clauses of Utah's state constitution do not prohibit a city council from opening its meetings with a prayer. *See Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993). In the wake of that decision, the municipal council of Murray City resumed a practice it had maintained since 1982—but suspended during the pendency of the appeal in *Separationists*—of opening each of its meetings with a prayer. Those prayers had been offered by members of the religious communities in and around Murray City, including various members of Judeo-Christian congregations, Zen Buddhists, and Native Americans. Each of those offering prayers during Murray City's council meetings did so at the initial request of the City Council, usually in response to a form letter the council circulated to local religious communities. Prior to the events at issue in this case, the city had never received an unsolicited request from a private individual to give a prayer at a council meeting. In light of this historical practice, Murray City had no written policy on its council prayers, and it had no formal guidelines for the content of its council prayers.

The decision in *Separationists*, and the ensuing resumption of legislative prayers by city councils throughout Utah, prompted Tom Snyder, plaintiff-appellant here, to draft a prayer that calls on public officials to cease the practice of using religion in public affairs.[3] Although Snyder's putative prayer is

2. The original panel in this case voted to affirm in part and reverse in part the district court's order. *See Snyder v. Murray City Corp.*, 124 F.3d 1349 (10th Cir.1997). This court granted the appellant's petition for rehearing en banc limited to the Establishment Clause issues presented in the case. We now vacate Part I.B. of the panel's opinion. We did not grant rehearing as to the other portions of the panel decision, and consequently, the remainder of the panel opinion remains in effect.

3. The text of Snyder's proposed prayer is as follows:

OPENING PRAYER

OUR MOTHER, who art in heaven (if, indeed there is a heaven and if there is a god that takes a woman's form) hallowed be thy name, we ask for thy blessing for and guidance of those that will participate in this meeting and for those mortals that govern the state of Utah;

We fervently ask that you guide the leaders of this city, Salt Lake County and the state of Utah so that they may see the wisdom of separating church and state and so that they will never again perform demeaning religious ceremonies as part of official government functions;

We pray that you prevent self-righteous politicians from mis-using the name of God in conducting government meetings; and, that you lead them away from the hypocritical and blasphemous deception of the public, attempting to make the people believe that bureaucrats' decisions and actions have thy stamp of approval if prayers are offered at the beginning of government meetings;

unusual and iconoclastic, because this case was decided on summary judgment we will assume without deciding that it is an invocational prayer.[4] *See Engel v. Vitale*, 370 U.S. 421, 424, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (noting that a "solemn avowal of divine faith and supplication for the blessings of the Almighty" is a "prayer" with an explicitly religious character); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. Unit A Aug.1981) ("Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object."). Although Snyder's supposed prayer can perhaps as easily be characterized as political harangue, the political aspect of a religious supplication does not necessarily invalidate the invocation's prayerful character. *See Karen B.*, 653 F.2d at 901 ("That [a prayer] may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise."). Nevertheless, the Establishment Clause speaks only to the religious aspect of Snyder's prayer, which we presume for purposes of this appeal, and as a result, we are not called in this case to evaluate the prayer's political overtones. By assuming the religious content of Snyder's prayer, we expressly reserve for another day the very difficult issue of attempting to discern the line between prayer and secular speech masquerading as prayer.

> We ask that you grant Utah's leaders and politicians enough courage and discernment to understand that religion is a private matter between every individual and his or her deity; we beseech thee to educate government leaders that religious beliefs should not be broadcast and revealed for the purpose of impressing others; we pray that you strike down those that mis-use your name and those that cheapen the institution of prayer by using it for their own selfish political gains;
>
> We ask that the people of the state of Utah will some day learn the wisdom of the separation of church and state; we ask that you will teach the people of Utah that government should not participate in religion; we pray that you smite those government officials that would attempt to censor or control prayers made by anyone to you or to any other of our gods;
>
> We ask that you deliver us from the evil of forced religious worship now sought to be imposed upon the people of the state of Utah by the actions of mis-guided, weak and stupid politicians, who abuse power in their own self-righteousness;
>
> All of this we ask in thy name and in the name of thy son (if in fact you had a son that visited Earth) for the eternal betterment of all of us who populate the great state of Utah. Amen.

Snyder first presented this prayer, and his request to recite it, to the city council in Salt Lake City, prompting media coverage of the proposed prayer including publication of extensive excerpts. *See, e.g.*, Jon Ure, *S.L. Man Wants to Ask Mother in Heaven to End Public Prayer*, Salt Lake Trib., Jan. 19, 1994, at B1. Rather than allowing Snyder to recite the prayer, officials in Salt Lake City decided to discontinue that city's practice of opening their city council meetings with a prayer.

Snyder next contacted officials in Murray City with a letter on March 23, 1994, expressing his interest in presenting a prayer at one of the council's upcoming meetings and asking for information on guidelines for such prayers and how a person is selected to give such prayers. This letter gave no hint as to the text of Snyder's proposed prayer. When Snyder received no response to his first letter, he sent a second letter on May 9, 1994, again expressing interest in giving a prayer at a city council meeting. This second letter again included no mention of the text of his proposed prayer.

On June 1, 1994, City Attorney H. Craig Hall responded to Snyder's letters by explaining that the city council had established an explicit policy that "all council meetings

4. Snyder's supplications draw on religious tenets held by many. *See Matthew* 6:5; *Book of Mormon*, 3 Nephi 13:6. Although there is admittedly some contradictory evidence in the record, Snyder has presented sufficient evidence to create a genuine dispute of fact as to the sincerity of his religious belief that prayer should be a private matter and should not be used to self-aggrandize the prayer-giver.

Nevertheless, if Snyder's invocation is not a "prayer," our ultimate conclusion that Murray City did not violate the Establishment Clause would remain the same. If Snyder's speech is a non-prayer, then for the reasons we discuss below in Part III, there would be no "impermissible motive" in preventing Snyder from reciting a non-prayer during a time permissibly reserved for legislative prayer. Thus, there would be no Establishment Clause violation. *See* Part III, *infra*.

will start with prayer," but the council had not established "formal policies regarding the nature and/or content of this reverence portion of their agenda." Hall's letter continued:

> The purpose of the "prayer" is to allow individuals that opportunity to express thoughts, leave blessings, etc. It is not a time to express political views, attack city policies or practices or mock city practices or policies.
>
> Comments on present city practices or policies may be made at city council meetings by one of two methods; either by requesting to be placed on the agenda, or, taking up to three minutes during the "citizen comment" portion of the meeting. The later [sic] method requires no prior arrangements to be made.[5]

Nowhere in his June 1 letter did Hall respond to Snyder's particular request for permission to give a prayer at a city council meeting.

On June 9, 1994, Snyder sent a third letter to Murray City, again repeating his request for permission to give a prayer at a city council meeting and this time including a copy of the text of his proposed prayer.

Three weeks later, Hall responded to Snyder's third letter, this time explicitly denying permission for Snyder to give a prayer at a city council meeting:

> The text of the proposed prayer is unacceptable. It does not follow the guidelines set forth in my letter dated June 1, 1994. Until your proposed prayer satisfies these guidelines, an invitation to participate in our opening ceremonies will not be forthcoming.

Snyder received Hall's denial letter on July 1, 1994, and filed the original complaint in this case the same day.

Snyder's subsequently amended complaint sought compensatory and punitive damages, as well as injunctive and declaratory relief, on the basis of Murray City's alleged violations of Snyder's First Amendment and procedural due process rights under the United States Constitution and the Utah Constitution, as well as his rights under the Religious Freedom Restoration Act of 1993. Following discovery and cross-motions for summary judgment, the district court ruled against all of Snyder's claims. *See Snyder I*, 902 F.Supp. at 1455 (granting summary judgment to Murray City); *Snyder II*, 902 F.Supp. at 1458 (denying Snyder's motion for new trial). On appeal, a divided panel of this court affirmed the district court's resolution of Snyder's federal claims but instructed the district court to dismiss, without prejudice, Snyder's state-law claims for want of adequate supplemental jurisdiction. *See Snyder III*, 124 F.3d at 1353–55. This court subsequently agreed to rehear only Snyder's federal Establishment Clause claim en banc.[6]

Discussion[7]

The very first command of our Bill of Rights, as it applies to the states through the Fourteenth Amendment, is that state and local governments "shall make no law respecting an establishment of religion." U.S. Const., amend. I, cl. 1. At its core, the Establishment Clause enshrines the principle that government may not act in ways that "aid one religion, aid all religions, or prefer one religion over another." *See Lee v. Weisman*, 505 U.S. 577, 600, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Blackmun, J., concur-

5. The text of this letter, with its references to attacks on city policies, suggests that City Attorney Hall already was aware of the general tenor of Snyder's proposed prayer even though Snyder had not yet included a copy of it in his letters to Murray City. At a later deposition in this case, Hall conceded that he was influenced by media coverage of Snyder's dealings with the Salt Lake City council when he wrote the June 1, 1994, letter.

6. The order for rehearing en banc initially specified two questions for the parties to address. This court, however, subsequently modified that order to delete the specific questions presented and "clarify that rehearing en banc is granted on the Establishment Clause issues in this case."

7. In light of the First Amendment issue raised in this appeal and our consequential " 'obligation to make an independent examination of the whole record,' " we review the district court's summary judgment decision de novo. *See Lytle v. City of Haysville, Kansas*, 138 F.3d 857, 862 (10th Cir. 1998) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

ring). As Justice Black declared for the Supreme Court more than fifty years ago, "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Everson v. Board of Educ.*, 330 U.S. 1, 16, 67 S.Ct. 504, 91 L.Ed. 711 (1947). This core understanding of our notion of religious liberty stretches back to the very genesis of the First Amendment. *See Reynolds v. United States*, 98 U.S. (8 Otto.) 145, 164, 25 L.Ed. 244 (1878) (discussing the history of the Establishment Clause and quoting Jefferson's letter to the Danbury Baptist Association on the purpose of the clause to "build[ ] a wall of separation between church and State").

Although there are many kinds of Establishment Clause claims, the prayer cases typically arise in a procedural posture that pits an audience member of a particular faith, often a minority religious view, against a government-sanctioned speaker who has recited a prayer, often expressing a majoritarian religious view, during a government-created prayer opportunity. *See, e.g., Lee*, 505 U.S. at 581, 112 S.Ct. 2649 (involving a student's challenge to a public school graduation prayer prepared by a local rabbi in compliance with school district guidelines developed by the National Conference of Christians and Jews); *Chaudhuri v. Tennessee*, 130 F.3d 232, 233–34 (6th Cir.1997) (involving a Hindu professor's challenge to a public university's practice of beginning university events and faculty meetings with prayers), *cert. denied*, — U.S. —, 118 S.Ct. 1308, 140 L.Ed.2d 473 (1998); *see also Bauchman v. West High Sch.*, 132 F.3d 542, 546 (10th Cir.1997) (involving a Jewish student's challenge to a Mormon music teacher's various practices and selection of allegedly religious music for a high school choir in Salt Lake City), *cert. denied*, — U.S. —, 118 S.Ct. 2370, 141 L.Ed.2d 738 (1998).

The difficulty of the establishment claim in this case flows partly from its inversion of the usual posture. Here, the plaintiff is the putative government-sanctioned speaker, and he alleges that in preventing him from reciting his prayer against government prayers, the government has established a religion. Despite its unusual posture, the essence of Snyder's contention is straight-forward: Snyder claims that in branding his particular prayer "unacceptable" and preventing him from offering it as part of the official "reverence period" of the municipal council meeting, Murray City has impermissibly preferred one religion over another. We must decide if that is so.

I. Sui generis status of legislative prayers

Prior to 1983, the lower courts had reached a consensus, but without any consistent rationale, on the conundrum of whether overtly religious prayers by local and state legislative bodies in opening their legislative sessions constituted the kind of religious activity banned by the Establishment Clause. With varying reasoning, the lower courts agreed that such legislative prayers did not fall within the prohibition against a "law respecting an establishment of religion." *See Bogen v. Doty*, 598 F.2d 1110, 1113–14 (8th Cir.1979) (applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), in upholding a county board's practice of invocational prayers because they had a "clearly secular purpose," but warning that the county's selection procedures for who should give such prayers were dangerously close to the "quagmire" of "excessive entanglement" and that the board would be in a "difficult position" if it rejected a volunteer because of his or her religious persuasion); *Colo v. Treasurer & Receiver General*, 378 Mass. 550, 392 N.E.2d 1195, 1199–1200 (1979) (upholding the state's practice of paying legislative chaplains in large part because of the practice's long history and tradition and because it did not present substantial "divisive political potential"); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888, 895–96 (upholding invocational prayers at a borough council meeting because the religious dimension of the prayers did not predominate over secular goals, nor was the primary effect of the prayer to promote or inhibit religion), *cert. denied*, 454 U.S. 958, 102 S.Ct. 495, 70 L.Ed.2d 373 (1981); *Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799, 800–01 (1968) (upholding a town's practice of invocational prayers at each annual town

meeting because of a de minimis religious effect, historic use, and similarity to religious references on coins, currency, public buildings and plaques).

In 1983, however, the Supreme Court swept away the various approaches with its pathmarking decision in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). Noting that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," the Court held that "[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer [opening a legislative session]." *Marsh*, 463 U.S. at 786, 791, 103 S.Ct. 3330, 77 L.Ed.2d 1019. In the course of reaching this holding, the Court surveyed the historical record of the views of the framers of the Constitution as well as the practices of the early Congresses and the infant state legislatures. The Court concluded, "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788, 103 S.Ct. 3330.

Although the Court relied solely—and to the exclusion of its traditional establishment tests—on a historical analysis to justify the practice of legislative prayers in *Marsh*,[8] since that decision the Court has repeatedly avoided applying *Marsh*'s mode of historical analysis. *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 603, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (rejecting the dissenting argument in *Allegheny County* that the *Marsh* historical analysis controlled the constitutionality of traditional crèche displays at Christmas: "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.") Instead, the evolution of Establishment Clause jurisprudence indicates that the constitutionality of legislative prayers is a *sui generis* legal question. As Justice Brennan noted in his dissent in *Marsh*, the kind of legislative prayers at issue in *Marsh* simply would not have survived the traditional Establishment Clause tests that the Court had relied on prior to *Marsh* and has continued to rely on in different contexts since *Marsh*. *See Marsh*, 463 U.S. at 796, 103 S.Ct. 3330 (Brennan, J., dissenting). For this reason, the mainline body of Establishment Clause case law provides little guidance for our decision in this case. Our decision, instead, depends on our interpretation of the holding in *Marsh*.

In describing its conclusion that legislative prayers do not violate the First Amendment, the *Marsh* Court approached the question first and foremost as a facial issue, separate from the particular nuances of the Nebraska practice there under review. The Court made clear that it was considering legislative prayers as a kind of religious genre, and it was this particular genre that was unvitiated by the Establishment Clause:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowl-

8. The historical analysis that formed the basis of Chief Justice Burger's majority opinion in *Marsh* has tempted many litigants and some courts to argue that the Supreme Court in *Marsh* created a whole new mode of analysis for Establishment Clause claims generally. *See, e.g., Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409–10 (6th Cir.1987) (holding that *Marsh*'s reliance on historical acceptance controlled the court's holding that nonsectarian, nondenominational school graduation prayers are constitutional). *But see Lee*, 505 U.S. at 589, 596–97, 112 S.Ct. 2649 (rejecting the view in *Stein* that school graduation prayers could be justified by their historical acceptance and stressing again the limited nature of its ruling in *Marsh* permitting invocational legislative prayers).

edgment of beliefs widely held among the people of this country.

Id. at 792, 103 S.Ct. 3330. This religious genre known as "legislative prayer" includes the traditional kind of invocational legislative prayers with which the Court was familiar, as well as similarly traditional governmental invocations such as the cry, "God save the United States and this Honorable Court," intoned by the Court's bailiff at the beginning of its own sessions.[9] *See id.* at 786, 103 S.Ct. 3330. As Justice O'Connor later explained, these kinds of "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 693, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). In *Lynch*, the majority observed that the Establishment Clause cannot mechanistically be applied to draw unwavering, universal lines for all of the varying contexts of public life. Rather, the clause erects a " 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' " *Id.* at 679, 104 S.Ct. 1355 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). The Court noted that "[i]t would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers [than legislative invocational prayer]." *Id.* at 674, 104 S.Ct. 1355.

[1, 2] We are obliged, therefore, to read *Marsh* as establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call "legislative prayer" does not violate the Establishment Clause. Furthermore, as a consequence of the fact that this genre of government religious activity cannot exist without the government actually selecting someone to offer such prayers, the decision in *Marsh* also must be read as establishing the constitutional principle that a legislative body does not violate the Establishment Clause when it chooses a particular person to give its invocational prayers. Similarly, there can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a certain person to give its prayers. The act of choosing one person necessarily is an act of excluding others, and as a result, if *Marsh* allows a legislative body to select a speaker for its invocational prayers, then it also allows the legislative body to exclude other speakers.

II. Constitutional limits on legislative prayers

Snyder argues that even if *Marsh* allows legislative prayers, that case imposes some limits on a legislative body's discretion to appoint or to exclude the persons who will recite its prayers. Snyder points out that when the Court turned to the particular nuances of the Nebraska practice in *Marsh*, the Court gave only conditional approval to the legislative chaplain system there. *See Marsh*, 463 U.S. at 793–95, 103 S.Ct. 3330. Snyder argues that in light of those conditions in *Marsh*, Murray City may not discriminate against his request to give an opening prayer based on the content of his proposed prayer.

Although we agree with Snyder that *Marsh* implicitly acknowledges some constitutional limits on the scope and selection of legislative prayers, those limits are not the ones Snyder would have us adopt. The Establishment Clause and *Marsh* simply do not require that a legislative body ensure a kind of equal public access to a legislative body's program of invocational prayers. Instead, the constitutional restraints on legislative prayers flow directly from the scope of the religious genre blessed in *Marsh*. What matters under *Marsh* is whether the prayer to be offered fits within the genre of legislative invocational prayer that "has become part of the fabric of our society" and constitutes a "tolerable acknowledgment of beliefs widely held among the people." *See id.* at 792, 103 S.Ct. 3330.

[3] The point at which an invocational legislative prayer falls outside the traditions of the genre and becomes intolerable occurs

9. This judicial invocational prayer also was recited prior to the oral arguments in this very case.

when "the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." [10] *See id.* at 794–95, 103 S.Ct. 3330; *see also Coles v. Cleveland Bd. of Educ.*, 950 F.Supp. 1337, 1347 (N.D.Ohio 1996) (relying on *Marsh* to uphold a school board's practice of invocational prayer because "the record does not support a finding that the board was using prayer as an attempt to convert audience members or to promote any particular belief"); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F.Supp.2d 1192 (C.D.Cal.1998) (denying a request for a preliminary injunction against a school board's practice of invocational prayer in light of *Marsh*). As *Marsh* indicated, the danger is not just an effort to proselytize or disparage an entire religion, but also efforts to proselytize or disparage the particular tenets or beliefs of individual faiths. *See Marsh*, 463 U.S. at 794–95, 103 S.Ct. 3330. The Court explained six years after *Marsh* that "not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." *See Allegheny County*, 492 U.S. at 603, 109 S.Ct. 3086 (quoting *Marsh*, 463 U.S. at 791, 103 S.Ct. 3330). Thus, the kind of legislative prayer that will run afoul of the Constitution is one that proselytizes a particular religious tenet or belief, or that aggressively advocates a specific religious creed, or that derogates another religious faith or doctrine. When a legislative invocation strays across this line of proselytization or disparagement, the Establishment Clause condemns it.

As a second constitutional restriction on legislative prayer, the Court in *Marsh* also warned that the selection of the person who is to recite the legislative body's invocational prayer might itself violate the Establishment Clause if the selection "stemmed from an impermissible motive." *See Marsh*, 463 U.S. at 793, 103 S.Ct. 3330. The Court implicitly indicated that the particular motive that is "impermissible" in this context is a motive in selecting the prayer-giver either to "proselytize" a particular faith or to "disparage" another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body. *See id.* at 793–95, 103 S.Ct. 3330.

[4] It is clear under *Marsh* that there is no "impermissible motive" when a legislative body or its agent chooses to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer. The genre approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose. That genre, although often taking the form of invocations that reflect a Judeo–Christian ethic, typically involves nonsectarian requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body. When a legislative body prevents its agents from reciting a prayer that falls outside this genre, the legislators are merely enforcing the principle in *Marsh* that a legislative prayer is constitutional if it is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *See Marsh*, 463 U.S. at 792, 103 S.Ct. 3330.[11]

10. Of course, all prayers "advance" a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power. Nevertheless, the context of the decision in *Marsh*—in which the Court considered the constitutionality of a Presbyterian minister's "Judeo Christian," "nonsectarian" invocations for the Nebraska Legislature—underscores the conclusion that the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause.

Rather, what is prohibited by the clause is a more aggressive form of advancement, i.e., proselytization. *See Marsh*, 463 U.S. at 793 n. 14, 794–95, 103 S.Ct. 3330. By using the term "proselytize," the Court indicated that the real danger in this area is effort by the government to convert citizens to particular sectarian views. *See Websters Third New International Dictionary (Unabridged)* 1826 (1986) (defining "proselytize" as "to convert from one religion, belief, opinion, or party to another"). As the Court reiterated in *Lee*, "[I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 591–92, 112 S.Ct. 2649.

11. The traditional tone for legislative prayers can be found as early as the constitutional convention in 1787, when Benjamin Franklin proposed

III. The constitutionality of Murray City's "Reverence Period"

Turning now to the specifics of this case, Snyder's amended complaint sought a declaratory judgment that Murray City's "conduct is in violation of ... the establishment protection ... of the United States Constitution." We do not perceive this request as seeking a declaration that Murray City's practice of beginning its council meetings with a prayer is unconstitutional as a whole. Rather, Snyder's request merely seeks a declaration that Murray City's particular denial of his individual request to participate in the city's "reverence period" at the opening of its meeting is unconstitutional.

[5] Snyder's claim must fail as a matter of law because his proposed prayer falls well outside the genre of legislative prayers that the Supreme Court approved in *Marsh* and the record is devoid of evidence indicating an intent to promote or disparage any religion. Not only does Snyder's prayer explicitly attack the genre itself, it also disparages those who believe that legislative prayer is appropriate. *See* Opening Prayer, *supra* note 3 (denouncing politicians who believe in the use of legislative prayer as "self-righteous," "hypocritical," "selfish," "mis-guided, weak and stupid," and calling the belief in the use of legislative prayer "blasphemous," "evil," and "cheapen[ing]"). Most importantly, Snyder's prayer aggressively proselytizes for his particular religious views and strongly disparages other religious views. *See id.* (asking for divine assistance to "guide" civic leaders to "the wisdom of separating church and state" and to "never again perform demeaning religious ceremonies as part of official government functions").[12] Snyder's prayer clearly draws on the tenets of his belief—which is an aspect of many different religious faiths—that prayer should only be conducted in private. Because Snyder's prayer seeks to convert his audience to his belief in the sacrilegious nature of governmental prayer, his prayer is itself proselytizing. As a result, Murray City was well within its rights under *Marsh* to deny permission for Snyder to recite his proposed prayer. A deliberative body has a right to take steps to avoid the kind of government prayer that would run afoul of *Marsh* and the Establishment Clause.

Having concluded that Murray City did not violate the Establishment Clause in refusing Snyder's prayer, we next address the point raised by the dissent to the original

that the convention begin each morning with "prayers imploring the assistance of Heaven, and its blessings on our deliberations...." 1 Max Farrand, *Records of the Federal Convention of 1787* 452 (1911), *quoted in Marsh*, 463 U.S. at 787 n. 6, 103 S.Ct. 3330.

The same tone also is evident in the prayers of Nebraska's legislative chaplain that the Supreme Court found unobjectionable in *Marsh*. See Joint Appendix at 92–108, *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (No. 82-23). For example, in 1975, the Rev. Robert E. Palmer offered the following prayer: "For ties that continue to bind us together, even when the going is rough, for common purposes we continue to recognize as larger than we are, even when the business at hand taxes our patience and our constituents; for the privilege of sharing in the inspirations—as well as the frustrations—of events which make headlines ... we now ask Your help, O Lord our God." *Id.* at 93–94. Similarly, in 1979 during the Easter season, the chaplain offered the following prayer: "Today as we are about to celebrate the great Holy Days of Christians and Jews, Holy Week and Passover, let us be reminded again through the faith and beliefs of our religions of the principles and directives which should guide us. May these Holy Days, then, enable us to act as true followers of the beliefs which we have and may it find expression in every act and law that is passed." *Id.* at 108.

Finally, a prayer offered in 1975 implored, "O Lord, our God, if ever we needed Thy wisdom and Thy guidance, it is now—as our Legislature begins a new session, standing upon the threshold of a new year, fraught with so many dangerous opportunities." *Id.* at 92.

12. In fact, virtually every supplication in Snyder's "Opening Prayer" variously calls on the citizens and leaders of Utah to convert from their adherence to public governmental prayer. In addition to the second paragraph quoted above, the third paragraph asks for divine assistance to "lead" Utah's politicians away from the practice of governmental prayer; the fourth paragraph asks that Utah's politicians be "educate[d]" and come to "understand" that prayer should be private and not used for the purpose of impressing others; the fifth paragraph asks that divine power "teach" the people of Utah that government should not participate in religion, and the sixth paragraph asks that divine power "deliver us from the evil of forced religious worship." *See* Opening Prayer, *supra* note 3

panel decision in this case, to the effect that there is sufficient evidence in the record below to raise a dispute of fact as to whether Murray City relied on an impermissible motive in its denial of Snyder's prayer. *See Snyder III*, 124 F.3d at 1357–58 (Briscoe, J., dissenting). The record includes circumstantial evidence to suggest that City Attorney Hall's letter of June 1, 1994, in which he outlined Murray City's standards for legislative prayers, was drafted specifically to exclude the kind of prayer that Snyder had proposed. *See id.* (pointing out that City Attorney Hall was aware of and influenced by newspaper accounts of Snyder's dealings with the city council in Salt Lake City). However, this evidence only establishes that Hall was concerned with the political nature of the proposed prayer and with the fact that it was not consistent with the genre of legislative invocational prayer for which the opening portion of the legislation session had been reserved.

This evidence only tends to establish that Murray City acted with a "permissible" motive in excluding Snyder's proposed prayer. Snyder's proselytizing and disparaging prayer falls well outside the scope of invocational legislative prayers found to be constitutional in *Marsh*, and thus there was nothing improper about excluding it from the time properly set aside for legislative prayer. It was therefore permissible to exclude Snyder's prayer from the city's "reverence period." In drafting guidelines for council prayers that excluded Snyder's prayer, the record demonstrates that Hall was attempting to exclude the prayer because of its proselytizing and disparaging nature.

Finally, Snyder attempts to incorporate the Free Speech Clause of the First Amendment into his argument in this appeal. Because these contentions fall outside the limitation of our order for rehearing—confined as it was to the Establishment Clause issues in this case—we will not address them.

Conclusion

Under the Establishment Clause of the First Amendment, the municipal council of Murray City has the power to open its meetings with the kind of legislative prayer that our nation over the course of more than 200 years has come to see as "tolerable." *See Marsh*, 463 U.S. at 792, 103 S.Ct. 3330. Furthermore, in the exercise of that power, Murray City has the discretion to prevent a proposed prayer that would be intolerable to that tradition. Snyder's prayer both proselytizes for his own particular brand of religion and disparages other contrary religious views. As such, it falls outside the genre of invocational legislative prayer authorized by *Marsh*, and Murray City did not violate the Establishment Clause in rejecting it. Thus, the district court correctly granted summary judgment against Snyder's Establishment Clause claim.

We AFFIRM the district court's dismissal of plaintiff's establishment claim. The remainder of the original panel opinion remains in effect as originally issued in *Snyder III*, 124 F.3d at 1352–53, 1354–55. We REMAND for further proceedings consistent with the disposition in *Snyder III*. *See id.* at 1355.

LUCERO, Circuit Judge, concurring in the judgment.

I concur in the judgment that Mr. Snyder is not entitled to the relief he seeks on his Establishment Clause claim.[1] I arrive at this conclusion using a different analysis from that employed by the majority. I write separately to state my disagreement with what I believe to be the majority's impermissible extension of *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). *Marsh* holds squarely that "legislative prayer" delivered by an established chaplaincy system is not per se unconstitutional. But the *Marsh* Court did not consider the constitutionality of the prayer format utilized by Murray City, wherein prayers are routinely

1. Like the majority, I do not read Snyder's amended complaint as directed to Murray City's practice of beginning its council meetings with prayer. With the majority, I understand that Snyder is only challenging the city's denial of his individual request to offer his prayer at the pre-meeting "reverence period." Were I to read his amended complaint more broadly, I would be obliged to endorse a result at odds with that reached by the majority.

offered, at the City Council's invitation, by members of the public acting as representatives of discrete religious groups. Contrary to the view of the majority, I believe the city's choice of format proscribes regulation of the content of the prayers offered.

However, contrary to the dissent, I do not believe that the city's elimination of its content regulations can salvage the constitutionality of its chosen prayer format. Although I agree with the dissent that Murray City's practice of excluding certain prayers for their content violates the Establishment Clause, Snyder is not entitled to give his prayer at a reverence period that is itself a violation of the Establishment Clause.[2] The remedy he wants is no remedy at all.

I

As plainly evidenced by the case before us, government officials operating an open prayer format are inevitably drawn into regulating the content of the prayers offered.[3] The majority believes such regulation to be sanctioned by *Marsh*. I respectfully disagree. Purporting to interpret and apply *Marsh* to this case, the majority avers that a governmental body can constitutionally bar a particular legislative prayer when "'the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" Maj. Op. at 1233–34 (quoting *Marsh*, 463 U.S. at 794–95, 103 S.Ct. 3330). I believe it misguided, however, to read this single passage from *Marsh* as standing for the far-reaching proposition that a governmental body can, in all circumstances, allow certain legislative prayers while censoring and barring others because they "proselytize" or "disparage" another faith or religious belief. Read properly, in the factual and historical context that anchors the case, *Marsh* does not vest a governmental body with such powers.

Marsh states that "[t]he question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause." 463 U.S. at 784, 103 S.Ct. 3330; *see also id.* at 786, 103 S.Ct. 3330 ("We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a State-employed clergyman.") (citing 459 U.S. 966, 103 S.Ct. 292, 74 L.Ed.2d 276 (Nov. 1, 1982)). Although *Marsh* may perhaps be read to extend to circumstances in which chaplains are *not* paid and in which there is no *single* officiating clergyman, *see id.* at 794 n. 18, 103 S.Ct. 3330, the opinion's historical treatment of legislative prayer shows that *Marsh* involves, and should be limited to, *established chaplaincies*—chaplaincies that are so structured that they become an arm or an office of the legislature.[4]

Congressional chaplains, like the chaplain at issue in *Marsh*, are not members of the public invited on some representative or wholly open basis to give legislative prayers. They are officers of the state, who hold official government positions. Referring to the origins of legislative prayer, the *Marsh* Court noted that:

> The tradition [of legislative prayer] in many of the colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of

2. Given the summary judgment posture of this case, I am obliged to regard Snyder's proposed contribution to the reverence period as a genuine expression of his sincerely held religious beliefs. *See Mosier v. Maynard*, 937 F.2d 1521, 1523–25 (10th Cir.1991); Appellant's App. at 259 (Dep. of Tom Snyder) ("Q: And does this opening prayer represent sincerely held religious beliefs on your part? ... A: Yes, it does."). As a result, I accept, for purposes of analysis, the majority's assumption that Snyder's language comprises a prayer

3. Asked to confirm that "Mr. Snyder's proposed prayer was rejected because of the content and for no other reason," Mr. H. Craig Hall, the Murray City Attorney, responded: "I think that is an accurate statement." Appellee's App. at 88–[illegible]

4. Of course, whether or not a chaplaincy is a salaried position may be an indicium of whether its occupant is an official government agent.

selecting a chaplain to open each session with a prayer.

Id. at 787–88, 103 S.Ct. 3330 (footnotes and citations omitted). *Marsh* underscores the fact that congressional chaplains are official governmental functionaries when, in discussing the history of the position, it states:

> [O]n April 7, 1789, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain; the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law.

Id. at 788, 103 S.Ct. 3330 (footnote and citations omitted). Noting that Nebraska's chaplaincy practice "is consistent with the manner in which the First Congress viewed its chaplains," *Marsh* further states that "[r]eports contemporaneous with the elections [of congressional chaplains] reported only the chaplains' names and not their religions or church affiliations." *Marsh*, 463 U.S. at 794 n. 16, 103 S.Ct. 3330. This again serves to make the point that the nature of the chaplaincy with which *Marsh* deals does not involve people acting as members, leaders, or spokespersons of particular religions. Rather, they are people who are first and foremost acting as officers of the various legislative bodies they serve.

It is this fact that explains *Marsh*'s cautionary language—on which the majority ultimately rests—that legislative prayer not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95, 103 S.Ct. 3330. Plainly, established legislative chaplaincies may not proselytize, or disparage a particular belief, consistent with the dictates of the Establishment Clause. Such chaplains speak for the legislature, and may not therefore champion particular religious beliefs while disparaging others. But, by the same token, the government has the authority to tell its representatives what they can and cannot do in their official capacities. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("[W]hen the State is the speaker, it may make content-based choices."). Prohibiting official chaplaincies from proselytizing on behalf of one religion, or disparaging another, is not only within the powers of the government, but serves a crucial Establishment Clause purpose because it ensures that the government does not, through its officers, espouse one particular religious view to the detriment of others.

However, when the person giving a legislative prayer does *not* speak from an established chaplaincy position, then *Marsh*, standing for the proposition that the government *may* censor prayers of proselytization, is inapplicable.[5] What is applicable is the Supreme Court's traditional Establishment Clause jurisprudence, specifically its prohibition on "excessive entanglement." *See Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The process of policing the prayers offered in an attempt to exclude proselytization or disparagement will inevitably "call[ ] for official and continuing

5. Admittedly, the line between an established chaplaincy and an open prayer system is not a bright one. But, as the Supreme Court has frequently noted, that is a feature inevitably common to much Establishment Clause jurisprudence. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 678–79, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.... The line between permissible relationships and those barred by the Clause can be no more straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' ") (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). But there can be no doubt that the facts of this case place it squarely outside *Marsh*. Murray City's practice sought "to invite a diverse community" to speak at prayer sessions. Appellee's App. at 10, and these invitations were sent to "associations" of a "religious nature," *id.* at 71–72. There is no suggestion in the record that such a diverse community of religious bodies, offering prayers before council meetings, spoke as government functionaries. Indeed, the City Attorney confirms that, in many cases, he has no idea what the invited parties will say—precisely because he does not know what religious beliefs such parties even hold. *See id.* at 183.

surveillance leading to an impermissible degree of entanglement." *Walz v. Tax Comm'n*, 397 U.S. 664, 675, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); *see also Widmar v. Vincent*, 454 U.S. 263, 272 n. 11, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (public university that offers its facilities for student group meetings "risk[s] greater 'entanglement' " by attempting to enforce exclusion of groups practicing religious worship and speech, in part because of "continuing need to monitor group meetings to ensure compliance with the rule"); *Lemon*, 403 U.S. at 620, 91 S.Ct. 2105 (statute's requirement that government examine school records to determine how much of total school expenditure is attributable to secular education and how much to religious activity, "is fraught with the sort of entanglement that the Constitution forbids"). Prayers will either have to be submitted for approval in advance, as was the case for Mr. Snyder, *see* Appellee's App. at 199 ("Until your proposed prayer satisfies these guidelines, an invitation to participate in our opening ceremonies will not be forthcoming"), then assessed by some government body using pre-established government criteria that purport to distinguish proselytizing from non-proselytizing behavior, or else assessed on the spot—the gavel ready—for such content before the amen is spoken.[6] And the process will have to be repeated time after time.

I cannot accept that the Constitution allows the government to subject private citizens—as opposed to official chaplaincies—to such liturgical supervision. "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.' " *Lee v. Weisman*, 505 U.S. 577, 588, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (quoting *Engel v. Vitale*, 370 U.S. 421, 425, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962)).[7]

II

However, the dissent's suggested alternative to the majority's proposal that the City Council regulate the content of public prayer offered during a pre-meeting reverence period—namely that the City permit all prayers, Snyder's included—is also unconstitutional. As Snyder's "prayer" starkly demonstrates, without content-based restrictions, the "reverence period" established by Murray City

6. A final alternative—that the government only extend invitations to those religious groups that it adjudges likely to abide by an implicit bar against proselytizing, a practice which may have occurred here, *see* Appellee's App. at 155—is obviously no less entangling. Such practice also raises the specter of religious groups molding public statements of their creeds in ways designed to elicit governmental approval, thus offending one of the core historical purposes of the Establishment Clause. *See infra* note 13.

7. The foregoing analysis accepts the majority's implicit assumption that Murray City rejected Snyder's prayer because it proselytized and disparaged other religions. Like the dissent, however, I believe the record raises serious questions as to whether this was in fact the City's grounds for refusing the prayer.

Mr. Hall, the City Attorney who made the decision to reject Snyder's prayer, claims that he did so pursuant to a long-standing, albeit implicit and never before invoked, practice of refusing prayers or invocations that expressed political views, or attacked or mocked city policies and practices. *See* Appellee's App. at 195. There is scant suggestion in the record that Hall refused the prayer because it disparaged other faiths. Rather, Hall's claimed focus was on what he perceived as disparagement of the City Council and its practice of allowing pre-meeting prayers.

Nonetheless, Snyder still validates his Establishment Clause claims. Even if one assumes Hall did not develop the stated criteria as a pretext for religious viewpoint discrimination (which assumption I make only for the purposes of the present discussion), the mere application of the criteria violates the Establishment Clause for at least two reasons. First, such application discriminates against religions that encompass stated tenets Hall deems inappropriately "political." If we assume, as we must, that Snyder's prayer is premised on his religious views, then Hall's objection to Snyder's "politics" inevitably amounts to discrimination against his religion as well. Second, development and application of the criteria necessitate a governmental determination of whether religious views are inappropriately political. That kind of determination requires an excessively entangling interaction between the machinery of government and religious practice. *See infra* section III; *cf. Widmar*, 454 U.S. at 272 n. 11, 102 S.Ct. 269 (given breadth and indeterminacy of what speech is "religious," state actor risks excessive entanglement by trying to identify and exclude such speech from public facilities).

will be used to disparage the religious beliefs of others. The resulting juxtaposition of aggressive proselytization with the exercise of legislative power violates the Establishment Clause.

Invocation of *Marsh* cannot protect such prayer. Once the government steps outside the historically determined confines of *Marsh*, it cannot regulate the content of the prayers it sponsors. The resulting unregulated government prayer sessions come to pose, as this case clearly illustrates, an unacceptable and inevitable risk of the advancement of certain faiths at the expense of others. A prayer session in which Snyder is offered—and takes—the opportunity to denigrate the faith of others is historically and philosophically far-removed from what *Marsh* sanctions as the "tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330. As the majority correctly observes, *Marsh* speaks only to legislative prayer of a specific "religious genre." Maj. Op. at 1232-33. *Marsh*'s reliance on the ecumenism of the Nebraska prayers is not to be ignored—just as it is not to be read to repudiate the Court's entire jurisprudence of excessive entanglement. To be constitutional, legislative prayer must be "part of the fabric of our society," *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330, or, as the majority aptly puts it, "a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose," Maj. Op. at 1234. If the offerings at a legislative prayer session depart from this historical norm, which—as Mr. Snyder's prayer shows—they assuredly will once Murray City frees the public forum it has created from content-based restrictions, then they can gain no protection from *Marsh*.

Outside the purview of *Marsh*, and subject to the usual canons of Establishment Clause jurisprudence, government-sponsored open prayer sessions marked by uncontrolled proselytizing are unconstitutional. True, the *purpose* of an open and unrestricted prayer session may, by analogy to *Marsh*, pass muster under the first step of the three-part *Lemon* test, 403 U.S. at 612, 91 S.Ct. 2105.[8] *See Lynch v. Donnelly*, 465 U.S. 668, 680-81, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (city's display of creche has "legitimate secular purposes" of celebrating, and depicting origins of, national holiday). A legislative body's *intention* in maintaining an open prayer session may be simply to "solemniz[e] public occasions, express[ ] confidence in the future, and encourag[e] the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693, 104 S.Ct. 1355 (O'Connor, J., concurring).

But the *effects* of such prayer are very different from the situation considered in *Marsh*, precisely because once members of the public are invited to pray, the government must relinquish its power to exclude those prayers that proselytize or disparage. The remedy Snyder would have us endorse for himself and others would require the government to invite proselytizers to initiate its meetings—which it cannot do without violating both the second and third steps of *Lemon*, which proscribe, respectively, "a principal or primary effect" of advancing or inhibiting religion, and "foster[ing] an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105 (citations omitted). A principal effect of open prayer, as practiced by Snyder and others, will be the symbolic association of government power with religious—and antireligious—intolerance and bigotry.[9] And the "divisive political potential" of such pray-

8. In *Lemon*, the Court describes the following test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105 (internal quotation and citations omitted).

9. The situation would be constitutionally different were the "reverence period" not so significantly characterized by religious activity. *See Board of Educ. v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."). Despite Murray City's countless legal pleadings that the reverence period was open to all-comers, religious and non-religious alike, and for purposes similarly religious and non-religious, the record is all but completely devoid of any support for such a conclusion. This may explain

er, which the case law identifies as a significant component of "excessive entanglement," *see Lemon*, 403 U.S. at 622–23, 91 S.Ct. 2105, is self-evident. "[A] prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral," *Weisman*, 505 U.S. at 588, 112 S.Ct. 2649, and that is even more the case when a prayer aggressively proselytizes and disparages the convictions of others present. This stands in stark contrast to *Marsh*. The ecumenism of *Marsh*'s legislative prayer does not advance religion beyond the Supreme Court's general recognition that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952). The same is true of other "official references to the value and invocation of Divine guidance." *Lynch*, 465 U.S. at 675, 104 S.Ct. 1355.[10] But what is true of the prayers in *Marsh*, the creche in *Lynch*, and

why both the district court, *see* Appellant's App. at 597, and the majority today, *see* Maj. Op. at 1228, appear to assume that invitations were only extended to religious groups and for the purpose of prayer. From the facts in the record, only one legal conclusion can follow: the "reverence period" is primarily characterized by religious activity. There is simply no way that the content of these sessions is sufficiently secular for them not to advance religion unconstitutionally. *Compare Widmar*, 454 U.S. at 269, 272–75 & n. 12, 102 S.Ct. 269 (where state-provided forum is "generally" and "equally" open for use by religious and non-religious groups, allowing religious groups does not have primary effect of advancing religion) *with County of Allegheny v. ACLU*, 492 U.S. 573, 599–600 & n. 50, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Op. of Blackmun, J.) (display of privately-sponsored creche on "Grand Staircase" of county courthouse violates Establishment Clause because "[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays").

The City Attorney's letter of June 1, 1994, to Snyder, states that "the Council has established the policy that all council meetings will start with prayer," Appellee's App. at 195, and defendants' answer to Snyder's amended complaint concedes this point, *see id.* at 5 & Appellant's App. at 82. I cannot agree with the City Attorney's unlikely semantics, whereby prayer does not denote inherently religious activity. (Nor, one might add, could the Supreme Court of Utah. *See Society of Separationists v. Whitehead*, 870 P.2d 916, 931–32 (Utah 1993)). Hall appears to concede the religious character of the proceedings when he confirms that the invited groups were "associations" of a "religious nature." Appellee's App. at 71–72. Asked to confirm that prayers were "religious exercise," Hall replies, "Not necessarily," *id.* at 53, but his only substantiation of that qualification is as follows: "We had some Navajos that came and left a blessing and I don't know if it was a religious exercise or not." *Id.* The City Attorney's lack of familiarity with Native American culture simply cannot be enough to render the prayer sessions primarily non-religious in nature. The defendants' answer to Snyder's amended complaint further supports this view by arguing that Snyder's proposed contribution to the reverence period was justifiably refused because "it was not a sincere and earnest entreaty directed to a divinity," and consequently fell outside the definition of "prayer." Appellant's App. at 83.

Murray City points to two items in the record in support of its claim on this point. Neither, in light of the overwhelming evidence to the contrary, can carry any weight whatsoever. The first is a form letter sent to invited groups, which refers to Murray City's effort "to encourage community and religious leaders, representative of the diverse culture of the Salt Lake Valley, to participate in this meaningful segment of our meetings." Appellee's App. at 201. This vague language in a form letter does nothing to obviate the conspicuous failure, save for the erroneous reference to the Navajo blessing, to point to a specific non-religious association to whom an invitation was extended. The second item is Hall's claim that the list of invited parties includes "some nondenominational groups." *See id.* at 69–70. As "nondenominational" does *not* mean "secular," I am unsure why Murray City should believe this renders the proceedings open to all, believers and nonbelievers alike. Indeed, Hall emphasizes how the prayer session differed from the Council's period for comments by individual members of the public, to which Snyder would have been welcome. *See id.* at 56–57. In short, a few evasive and ambiguous statements cannot support the implausible conclusion that "prayer" has nothing to do with religion. Thus this case conspicuously lacks the "important index of secular effect" that is provided by the "provision of benefits to [a] broad spectrum of groups." *Widmar*, 454 U.S. at 274, 102 S.Ct. 269

10. It is for this reason that numerous forms of everyday "ceremonial deism" pass constitutional muster. (This phrase is used in *County of Allegheny*, 492 U.S. at 595 n. 46, 109 S.Ct. 3086 (Op. of Blackmun, J.), and was coined by Walter Rostow in 1962. *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum.L.Rev.2083, 2091–92 (1996)). An incomplete list of such practices would obviously include the post-1954 Pledge of Allegiance ("under God"); the national motto as inscribed on our national currency ("In God We Trust"); the invocation to the Deity prior to judicial proceed-

the Sunday closing laws in *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), namely that their "reason or effect merely happens to coincide or harmonize with the tenets of some or all religions," *id.* at 442, 81 S.Ct. 1101, is assuredly not the case for an open prayer session, sponsored by a legislative body, in which proselytization and disparagement must of necessity be allowed. When the government invites a cross-section of religious parties—proselytizers included—to appear before its meetings, the resulting disparagement of other faiths can hardly be regarded as mere happenstance.[11] Consequently, I cannot agree that this case presents grounds for a remand. Snyder has shown an Establishment Clause violation in the city's exclusion of his prayer, but his requested remedy would violate the Establishment Clause just as surely.

III

The majority assumes that in approving the chaplaincy format before it in *Marsh*, the Court somehow sanctioned a different format which permits a city council routinely to initiate its meetings with an open prayer session at which members of the public are invited to pray. I disagree with that view, just as I would with the proposition that by favorably referring to our customary practice of opening court with the familiar intonement, "God save the United States and this Honorable Court," *Marsh* somehow would permit us to require the Clerk of the Court to organize a reverence period at the opening of court assuring that representatives of a broad spectrum of religious denominations are included in a prospective list of supplicants invited to seek the blessings of Providence on the proceedings of the day. The very organization of such prayer sessions—in the case at bar, the organization and selection of those delivering prayer is a duty of the Secretary to the City Council, *see* Appellee's App. at 36—comes perilously close to the establishment of religion.

Certainly, the mere administration of an open prayer session by the government may result in a level of entanglement far beyond that sanctioned by historical practice in *Marsh*. That is so, even when, as a result of the free choice of the invited public, a legislative prayer session is not marked by proselytization or disparagement. In running a prayer session open to the public, the government will need to identify which members of the public appropriately represent the diverse religious life of the community. That will require a government determination of what creeds and philosophies are to count as religious. Given the inevitable limits on the time available for legislative prayer, the government may also have to resolve which are sufficiently representative to earn its favor, and in what order.[12] Finally, as in this case, the government will have to distinguish between prayer and political statement.[13]

ings ("God save the United States and this Honorable Court"); the swearing-in of government officials and witnesses in court proceedings ("so help me God"); public holidays on Christian Holy Days; references to the Almighty in inaugural addresses; and Thanksgiving Day proclamations.

11. Or, to put it in terms of Justice O'Connor's "endorsement" analysis, *see Wallace v. Jaffree*, 472 U.S. 38, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring), Snyder's prayer, if given at an open prayer session before a City Council meeting, would strike an "objective observer" as government endorsement of the disparagement of faith.

12. According to Mr. Hall, the City Attorney, "[i]ts impossible when you have only 24, 25 Council meetings to offer everybody the opportunity to pray." Appellee's App. at 159.

13. There is also a grave risk that religious groups will seek to earn the government's favor with the intention of obtaining an invitation, or of increasing the frequency of their invitations, or of being invited to speak before especially significant and visible legislative sessions. In seeking governmental favor, religious groups may become subject to an implicit form of government regulation—a danger that underlies much Establishment Clause jurisprudence. *See Weisman*, 505 U.S. at 609, 112 S.Ct. 2649 ("We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular.") (Blackmun, J., concurring). We note in this case that the City Attorney, when asked whether the city inquires as to the content of a prayer prior to its delivery, responded: "As far as I know we've never asked. There has been no need to ask. Everybody has been so positive and met the unwritten guidelines...." Appellee's App. at 155. The Attor-

None of the administrative machinery necessary to such tasks is endorsed by *Marsh*. There, because our social and political history has already made the necessary determinations, there is less need for day-to-day governmental administration of a legislative prayer "system." Because this case is so readily resolved on the two grounds identified above, I need not conclusively determine whether Murray City's administration of its prayer system unconstitutionally entangles government and matters of religion. But legislative bodies should appreciate that an open prayer system has the potential, in its mere administration, to violate the Establishment Clause.

IV

Under the foregoing analysis, government would have to seek the sanctuary of *Marsh* should it wish to maintain legislative prayer. It may appear ironic that the Establishment Clause should endorse official chaplaincies, while proscribing a practice of inviting prayer volunteers who represent many and varied religious faiths. But though this effect may appear establishmentarian, a closer inspection proves otherwise. In fact, the strength and diversity of religious life is doubly benefitted by a legislative retreat to *Marsh*.

First, *Marsh* requires that official chaplaincy systems do not proselytize for one religion or disparage others. Though official chaplains speak with the authority of government to an unparalleled extent, *Marsh* ensures that their pronouncements are broadly ecumenical—no more religious, indeed, than the "fabric of our society" at large. *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330. Second, as Madison recognized, "[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment]." James Madison, Memorial and Remonstrance against Religious Assessments (1785), *in The Complete Madison* 309 (S. Padover ed.1953). As this case shows, when bound to the secular, religion is no longer free to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach*, 343 U.S. at 313, 72 S.Ct. 679.

ney's apparent cause for celebration is—to my mind—cause for grave constitutional concern

BRISCOE, Circuit Judge, dissenting:

I respectfully dissent. Underlying the majority's opinion is the implicit assumption that the reverence portion of City Commission meetings is a nonpublic forum in which the speakers, though not paid by or otherwise directly connected to the City, speak on behalf of the City. Based upon this assumption, the majority concludes the City has the right to control or regulate who speaks on its behalf and what message is conveyed. Because I disagree with the majority's underlying assumption, I also disagree with its conclusion that the City properly rejected Snyder's request to speak based upon the content of his proposed prayer.

I.

In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Court emphasized the importance of context in determining the extent to which the government can control speech. "[W]hen the State is the speaker," the Court noted, "it may make content-based choices." *Id.* at 833, 115 S.Ct. 2510. More specifically, it may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* In contrast, when the State simply facilitates "a diversity of views from private speakers," it may not discriminate based on the viewpoint of a particular private speaker. *Id.* at 834, 115 S.Ct. 2510

It is therefore critical, in deciding Snyder's appeal, to first determine the context in which the dispute arose. More specifically, it is necessary to decide whether Snyder was denied the opportunity to speak on behalf of the City or whether he was denied the opportunity to speak on his own behalf. As is apparent from the discussion in *Rosenberger*, the determination of this context will have a dramatic effect on how the appeal is analyzed and ultimately decided.

In rejecting Snyder's Establishment Clause claim, the majority implicitly assumes persons who speak during the reverence period do so on behalf of the City. Armed with

this assumption, the majority concludes, based upon its interpretation of *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (deciding constitutionality of opening legislative sessions with a prayer by a chaplain appointed and paid by state), that the City has the right to control the content of messages conveyed during the reverence period, and the City did not violate the Establishment Clause by rejecting Snyder's tendered prayer because, in the majority's opinion, the prayer falls outside the bounds of constitutionally permissible legislative prayer. For reasons that follow, I cannot accept the majority's assumption.

As I indicated in my dissenting opinion from the original panel opinion, I believe "a reasonable observer aware of the City's practice of inviting persons representing a broad range of religious and nonreligious viewpoints to give invocations would not regard Snyder's prayer as representing the City's endorsement of his particular beliefs." *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1357 (10th Cir.1997) (dissenting opinion). In other words, I do not believe any of the speakers offering prayers during the reverence period could reasonably be perceived as speaking on behalf of the City. *See generally County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (endorsement test depends on observer's reasonable perception of particular government policy).

To illustrate the point more thoroughly, I believe it is helpful to review the type of forum with which we are dealing.[1] *See generally Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 761, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (applying forum analysis to decide Establishment Clause issue). "[T]he Supreme Court has recognized three distinct categories of government property: (1) traditional public fora; (2) designated public fora; and (3) nonpublic fora." *Summum v. Callaghan*, 130 F.3d 906, 914 (10th Cir.1997) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Undoubtedly, the reverence period at issue here does not fall within the category of traditional public fora for it is not at all similar to areas such as "streets and parks[,] which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. at 45, 103 S.Ct. 948 (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)). Instead, the reverence period is either a designated public forum or a nonpublic forum.

"A designated public forum is property the government has opened for expressive activity, treating the property as if it were a traditional public forum." *Summum*, 130 F.3d at 914. Such a forum "may be created for a limited purpose such as use by certain groups ... or for the discussion of certain subjects." *Perry*, 460 U.S. at 45 n. 7, 103 S.Ct. 948. In contrast, a nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* at 46, 103 S.Ct. 948. "Implicit in the concept of the nonpublic forum is the right [of the government] to make distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49, 103 S.Ct. 948.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). To determine whether the government has intentionally created a designated public forum, we look to "the policy and practice of the government," as well as "the nature of the property and its compatibility with expressive activity." *Id.*

Since 1982, the City in this case has incorporated a reverence period as part of the opening ceremonies of its City Council meet-

1. Although the scope of our en banc review is purportedly limited to Snyder's Establishment Clause claim, the inescapable fact is that this case lies at the intersection of the Establishment, Free Speech, and Free Exercise Clauses of the First Amendment. Thus, although the concepts of public fora are typically associated with cases involving free speech claims, they are useful in deciding the outcome of this case.

ings. Speakers during the reverence period are not public officials. Rather, the City has "made efforts to assure that a broad cross-section of the community would be represented" during the reverence period. Appellant's App. at 162. To effectuate this goal, Jewel Chandler, the secretary to the City Council, regularly "compile[s] lists of various denominations and other groups" who she thinks "would be potentially willing to come to the City Council meetings based on invitation to give a thought, prayer, whatever." Appellee's App. at 36–37. Chandler sends invitations to these groups, which read in part:

> It has long been a custom of the Murray City Municipal Council to include an invocation or inspirational message as part of the opening ceremonies in Council meetings.
>
> Several years ago the Murray City Council undertook a vigorous effort to encourage community and religious leaders, representative of the diverse culture of the Salt Lake Valley, to participate in this meaningful segment of our meetings.
>
> We would, therefore, invite you to be a part of this program by consenting to offer an invocation, appropriate message or inspirational thought at one of our meetings.

Id. at 201. According to the City, participants in the reverence period "have included representatives from Zen Buddhists, Native Americans, a cross section of Judeo–Christian congregations, Quakers, and others." Appellant's App. at 163. The invitations contain no restrictions on the messages that speakers can give. Further, at no time (save for this case) has the City ever asked a particular speaker about content of a message or conveyed any guidelines to a particular speaker. In fact, City Attorney Hall testified:

> I don't have a clue ... what the Murray Baptist Church is going to say just as I did not have a clue as to what the Zen Buddhists were going to say. I don't know what the religious beliefs are. I don't know the particular tenants of their religious beliefs. I don't have a clue what they're going to say.

Appellee's App. at 183. Hall also testified:

> If a person wants to talk in the Buddhist faith about exhortation and blessings, that's fine. If the Navajos want to come in and do what they do. If the Catholics and Buddhists and Baptists and Seventh Day Adventists come in and don't mock city practices and policies and procedures during that period of time, we're not going to determine what their expression of thought or their statements are going to be.

Id. at 157. Finally, prior to Snyder's request to speak, the City had not developed any guidelines concerning the content of messages that could be given during the reverence period.

Taken together, I believe these uncontroverted facts demonstrate an intent on the part of the City to designate the reverence period as a public forum open to members of the community for the purpose of conveying religious and/or inspirational messages. In reaching this conclusion, I find significant (1) the City's goal of having a broad cross-section of the community speak during the reverence period, and (2) the lack of restrictions placed on reverence period speakers. To me, both of these factors indicate the City's intent to treat the reverence period as a setting open to all community members, regardless of religious viewpoint. I also find significant the fact that the reverence period occurs within the broader framework of the City Commission meetings, which themselves are designated public forums given the fact that citizens are encouraged to attend and voice their opinions. *See Grossbaum v. Indianapolis–Marion County Bldg. Auth.*, 100 F.3d 1287, 1296 (7th Cir.1996) ("Legally created public fora are fora such as school board meetings"), *cert. denied* — U.S. —, 117 S.Ct. 1822, 137 L.Ed.2d 1030 (1997); *compare Widmar v. Vincent*, 454 U.S. 263, 267 n. 5, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (in considering whether university meeting facilities were a public forum, the Court emphasized the campus possessed many characteristics of a traditional public forum), with *Cornelius*, 473 U.S. at 805, 105 S.Ct. 3439 (in

concluding the combined Federal Campaign charity drive was a nonpublic forum, the Court emphasized the federal workplace, where the drive took place, was a nonpublic forum). With regard to this latter point, a finding that the reverence period is a designated public forum is not inconsistent with the "normal uses" of the overall setting (i.e., the City Commission meetings).

The conclusion that the reverence period is a designated public forum for private religious/inspirational expression demonstrates that the City's ability to control the content of messages conveyed during the reverence period is much more limited than suggested by the majority. "For the State to enforce a content-based exclusion" when dealing with access to any type of public forum, "it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45, 103 S.Ct. 948. Although "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech," *Pinette*, 515 U.S. at 761–62, 115 S.Ct. 2440, no such interest was present here. Specifically, because Snyder could not have reasonably been perceived as speaking on behalf of the City, there was no necessity for the City to edit his prayer or deny him the opportunity to speak based on the content of his proposed prayer.[2] *See Pinette*, 515 U.S. at 763, 115 S.Ct. 2440 (state could not justify content-based restrictions because there was no potential Establishment Clause violation); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (same); *Widmar*, 454 U.S. at 276, 102 S.Ct. 269 (same).

Ultimately, I believe the City overstepped its bounds and violated the Establishment Clause by rejecting Snyder's request to speak based on its distaste for the content of his tendered prayer. "[T]he [Establishment Clause's] guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839, 115 S.Ct. 2510. Here, however, "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the [City's] course of action." *Id.* at 845, 115 S.Ct. 2510. In particular, the City's action evinced a hostility toward Snyder's religious viewpoints, and thereby "undermine[d] the very neutrality the Establishment Clause requires." *Id.* Stated in different terms, the City's action clearly had the effect of disapproving of Snyder's religious viewpoints.[3] *See County of Allegheny*, 492 U.S. at 592–93, 109 S.Ct. 3086.

In the end, the City cannot have it both ways: it cannot purport to open the reverence period to a broad cross-section of the community without restrictions, while at the

2. Even if the reverence period is considered a nonpublic forum, I do not believe the speakers were speaking on behalf of the City. Rather, for many of the reasons already outlined, I believe the City chose to allow private citizens access to the forum to speak on the subject matter of religion and spirituality. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (school district chose to allow private citizens access to nonpublic forum for wide variety of social, civic, and recreational purposes); *see also Summum*, 130 F.3d at 914–19 (discussing nonpublic forums which have been opened for limited access to public). Thus, the only way the City could have properly rejected Snyder is if its decision was "reasonable in light of the purpose served by the forum and [was] viewpoint neutral." *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439 (discussing restrictions on access to nonpublic forum); *see also Grossbaum v. Indianapolis-Marion Bldg. Auth.*, 63 F.3d 581, 587 (7th Cir.1995). I do not believe the denial of access to the forum would have been reasonable if it was based on concern about a potential Establishment Clause violation, nor do I believe the City Attorney's stated reasons for the denial were reasonable. Rather, I believe the uncontroverted evidence indicates Snyder was denied access solely to suppress the point of view he espoused in his tendered prayer. *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439.

3. In my dissenting opinion from the original panel decision, I outlined in greater detail why I believed the City's actions violated the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). 124 F.3d at 1358–60. I continue to stand by my earlier analysis, but find it unnecessary to incorporate all of it into this opinion.

same time limiting a particular speaker's access to the reverence period because of its distaste for the speaker's proposed message. Thus, I believe it must either allow Snyder the opportunity to give his tendered prayer or cease its currently-formatted reverence period altogether.

II.

Even assuming, arguendo, I were to accept the majority's assumption that the reverence period is a nonpublic forum in which the speakers offer prayers and messages on behalf of the City, I could not fully join the majority opinion. In particular, I believe the majority has adopted an improper analytical framework that requires it to do precisely what the Supreme Court in *Marsh* was loathe to do: sit as a board of censors on an individual prayer. Further, I am not convinced the majority's framework is useful for determining whether the City acted with improper motives.

Only a minor portion of *Marsh* touches on the propriety of selecting government-sanctioned speakers for invocational prayer sessions. In particular, the appellant challenged the fact that the Nebraska legislature, in carrying out its practice of invocational prayer, had selected a chaplain of only one denomination over a period of approximately sixteen years. The Court rejected this challenge, stating:

> We, no more than members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that [the chaplain] was reappointed because his performance and personal qualities were acceptable to the body appointing him. [He] was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during [his] absences. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.

463 U.S. at 793–94, 103 S.Ct. 3330. Although the quoted language does not provide us with a precise framework to follow in determining the constitutional propriety of a particular selection (or rejection) decision, it nevertheless provides us with two important principles. First, it expressly indicates we should focus on *evidence* pertaining to the legislative body's reasons for selecting or rejecting a particular speaker. Second, in analyzing such evidence, the ultimate question is whether or not the selection or rejection "stemmed from an impermissible motive." 463 U.S. at 793, 103 S.Ct. 3330.

In establishing its framework for reviewing Snyder's claim, the majority acknowledges the second principle, but effectively ignores the first. The majority begins by acknowledging that, in accordance with *Marsh*, a selection decision cannot stem from an impermissible motive. Based upon this principle, the majority then concludes "there is no 'impermissible motive' when a legislative body or its agent chooses to reject a government-sanctioned speaker because the tendered prayer falls outside the long-accepted genre of legislative prayer." From this conclusion, the majority makes the insupportable leap in logic that the issue of motive can be decided solely by focusing on the content of the proposed prayer. Ultimately, because the majority believes Snyder's proposed prayer falls outside the boundaries of acceptable legislative prayer, it concludes the City acted with permissible motives in rejecting the prayer.

The majority's analytical framework runs counter to *Marsh*. *Marsh* provides prayer content is simply not an issue for the federal judiciary unless a claim is made that an entire practice of legislative prayer has been "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794–95, 103 S.Ct. 3330. No such claim has been made here. Thus, by adopting the framework outlined above, the majority ignores the Supreme Court's directive and effectively opens the door to future judicial review of legislative prayers[4] outside the narrow confines outlined in *Marsh*.

4. I use the term "legislative prayers" to refer to prayers given on behalf of a legislative body.

Additionally, the majority's analytical framework simply does not do what it purports to do, i.e., ferret out evidence of motive. The fact a reviewing court concludes a tendered prayer is or is not "constitutionally acceptable" says nothing about the motivations of the legislative body that actually rejected the prayer. Indeed, it is entirely conceivable that what turns out to be a "constitutionally unacceptable" prayer could have been rejected by a legislative body based solely on its distaste for the proposed speaker's religious beliefs. On the flip side, if a legislative body rejects a proposed prayer solely because of concern for complying with *Marsh*, the majority would nevertheless apparently infer impermissible motives if it concludes the prayer is "constitutionally acceptable." Both of these examples demonstrate the majority's framework requires absolute perfection on the part of those legislative bodies that attempt to conform their own prayers to the dictates of *Marsh*.[5] For these reasons, I believe the content of a tendered prayer is, at best, but one piece of evidence pertaining to the issue of motive.

III.

I would reverse the district court's grant of summary judgment and remand Mr. Snyder's Establishment Clause claim for further proceedings.

SEYMOUR, Chief Judge, joins in the foregoing dissent.

5. I again emphasize that my criticisms are confined to those situations involving prayer by government speakers. Where, as here, we are dealing with private expression, absolute perfection *is* required because a private party's free speech rights are affected by the government's decision. *See, e.g., Pinette*, 515 U.S. at 763, 115 S.Ct. 2440 (rejection of private expression cannot be based on government's incorrect conclusion concerning potential Establishment Clause problem).

Gary KAMPLAIN, Plaintiff—Appellee,

v.

CURRY COUNTY BOARD OF COMMISSIONERS; Frank H. Blackburn; Paul D. Barnes; Darrel Bostwick; Johnny Chavez; and Joel David Snider, Defendants—Appellants,

and

Mike Jackson, Sheriff, and Matt Murray, Chief Deputy, Defendants.

No. 97-2144.

United States Court of Appeals, Tenth Circuit.

Oct. 27, 1998.

Meeting attendee brought § 1983 action against county board of commissioners and its members alleging that they violated his First Amendment free speech rights by voting to ban him from all future commission meetings and subsequently deciding to prohibit him from participating in or speaking before commission meetings. The United States District Court for the District of New Mexico, Wiley Daniel, J., denied board's and members' motion to dismiss, and they appealed. The Court of Appeals, McKay, Circuit Judge, held that commissioners' actions were administrative, and they thus were not legislatively immune from attendee's claims.

Affirmed.

1. Federal Courts ⇐554.1

Court of Appeals has jurisdiction to address whether claims are barred by absolute legislative immunity where district court's denial of immunity turns on an issue of law. 28 U.S.C.A. § 1291.

Tab 5

DETERMINATIVE PROVISIONS

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

Utah Const., Art. I, Sec. 4.

"No law shall be passed to abridge or restrain the freedom of speech or of the press."

Utah Const., Art. I, Sec. 15.

"No person shall be deprived of life, liberty or property, without due process of law."

Utah Const., Art. I, Sec. 7.

Tab 6

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TOM SNYDER,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 990907806
vs.	:	
MURRAY CITY CORPORATION, a municipal corporation and H. CRAIG HALL, City Attorney for Murray City Corporation,	:	
Defendants.	:	

Plaintiff claims that Murray City's denial of his offer to pray before the City Council meeting interferes with his exercise of religion under the free exercise guaranteed by Article I, Section 4, of the Utah Constitution. He further argues that Murray City violated the establishment clause and that he has been deprived of the liberty interests without due process. He further claims a violation of his free speech right. The defendant's Motion to Dismiss the free speech claim under Article I, Section 15, of the Utah Constitution is granted based on the five year statute of limitations.

Article I, Section 4, provides that:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as qualification for any office of public trust or for any vote at any election;

> nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

Plaintiff argues that the defendant did not remain neutral and therefore violated plaintiff's right to free exercise. The City argues that it does not have an affirmative duty to provide Snyder with a forum in which to exercise his religion. Furthermore, the City contends that it did offer Snyder the opportunity to speak during the public comment period of the meeting. Finally, the City claims that Snyder did not have a deeply held religious belief in the practice he seeks to exercise.

Snyder admits that his purpose in volunteering to offer prayer before the Murray City Council meeting was to illustrate to the Murray City Council the error in their prayer policy and to get them to abandon said policy. To this end, the Snyder "prayer" is really a protest and since Snyder chose to style his political commentary as a "prayer," it makes a mockery of prayer for the purpose of embarrassing the listeners, it contains no sincere application to any form of deity, and as pointed out by the defendant in their briefs, it is critical of the policy of Murray

City and criticizes politicians in general and any coincidental bumping together of church and state.

The free exercise clause bars any law prohibiting the free exercise of religion. This is for the purpose of preventing government from outlawing or seriously burdening a person's pursuit of religion. The City relies primarily on the conclusions of the United States District Court and the United States Court of Appeals in determining that it did not violate Utah's free exercise clause. In response, Snyder argues that reliance upon federal decisions is improper because the Utah Constitution provides individuals with greater protection than federal law. This is true, and in support thereof Snyder cites Society of Separationists v. Whitehead, claiming that the City did not remain neutral and therefore his free exercise rights were violated (870 P.2d 916 (1993)).

While the Society of Separationists is instructive, the issues are distinguishable from the present case. First, Society of Separationists contains a direct challenge to Salt Lake City's policy allowing prayer at the beginning of City Council meetings. Snyder does not challenge the policy of allowing prayer, but challenges instead the accessibility of the opportunity to give a prayer to all individuals. Second, Society of Separationists focuses on that portion of Article I, Section 4, which provides that "no public money or property shall be appropriated for or

applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

To be valid, a free exercise claim must involve a "religious belief." Snyder provides this Court with an Affidavit stating that the convictions and beliefs expressed in his prayer are sincere and religious. He also provides an Affidavit from a philosophy professor at the University of Utah stating that his "statement" is a "prayer." The federal court in the Snyder case found that Snyder's speech was political and not religious. This Court differs with both Affidavits recognizing that Snyder's statement is clearly non-religious, while it may be sincere.

The City argues that it did not have an affirmative duty to provide Snyder with a forum in which to exercise his "religion" and that it has a right to run a Council meeting subject to rules of order and stability, and that it is completely reasonable to require Snyder to speak during the public comment portion of the meeting. Murray City's policy and practice has been to have an opening ceremony with a purpose of promoting civility, lofty thoughts, attention to agenda items and to clear out the clutter of the day. Snyder's statement is contrary to said purpose.

As argued by Snyder, the Utah Supreme Court in Society of Separationists states that the Utah Constitution provides greater protection than federal law. Society of Separationists gives an

expansive definition of "religious worship, exercise or instruction," but Snyder's statement still falls without that definition. However, under Society of Separationists, whether or not the "prayer" is inherently religious may not be dispositive because a non-religious statement should be given the same rights to expression as a religious statement.

Snyder argues that the City violates the establishment clause by disallowing the presentation of Snyder's beliefs while allowing other religious beliefs and ideas to be presented. Snyder argues that the City improperly prefers religion over non-religion in violation of Article I, Section 4. Furthermore, Snyder claims the City did not have any policy or practice regarding who can perform an opening prayer, a claim which appears to be valid.

The City argues that permitting Snyder's "prayer" would have violated the Society of Separationists, since under that case opening ceremonies cannot be used for proselytizing. In Society of Separationists the court stated that prayer is "a portable, yet inherently religious, exercise. It need not occur within a group of celebrants to take on religious *character*, although it may arise there. One person praying, silently or aloud, alone in a crowd, among nonbelievers or believers, is still participating in a religious exercise. We think to hold otherwise would demean prayer and those who practice it." Snyder's "prayer" fails to meet this

definition of religious exercise and to include it as a prayer or as an exercise of religion would demean those who do pray and who practice religion.

Again, Society of Separationists is distinguishable from the instant case. As stated above, it contains a direct challenge to Salt Lake City's policy allowing prayer at the beginning of City Council meetings, which is not a challenge that Snyder makes. He challenges accessibility. Society of Separationists focuses on that portion of Article I, Section 4, regarding the expenditure of public money in support of an ecclesiastical establishment and that appears to not be at issue in the instant case. In the Society of Separationists action the Salt Lake City Council's opening ceremony policy had been adopted, but was not formalized as an ordinance or resolution, however, the policy was formalized as a resolution soon thereafter. The Society of Separationists court specifically noted that it did not believe that the informal status of the policy at the time the lawsuit filed was "outcome determinative." The Murray City policy was less formal if anything than the City Council's policy, and it is uncertain whether Murray City intended to formalize that policy or not.

Although the Utah Constitution provides greater protection than federal law, the federal court's interpretation is of interest. Judge Greene of the United States District Court

concluded that Snyder's prayer did not violate the federal establishment clause and was "properly excluded from the reverence portion of the meeting, however, because it disparages the faith and beliefs of others, and contains political commentary concerning the City's practices and it proselytizes and advances plaintiff's belief concerning church and state." Snyder v. Murray City Corp., 902 F.Supp. 1444, 1452 (1995). The United States Court of Appeals held that the "establishment clause does not give any individual the right to establish his religion by guaranteeing an opportunity to pray during public meetings and certainly does not require Murray City to permit all comers to speak during the reverence portion of its City Council meetings." Snyder v. Murray City Corp., 124 F.3d 1349, 1353 (1997).

In order to avoid a religious clause challenge, it appears that Murray City must engage in an opening ceremony based upon the concept of government neutrality. Whether or not the Utah Supreme Court in Society of Separationists envisioned that governmental neutrality would encompass a "prayer" such as Snyder's "prayer" is unclear. Under its discussion of neutrality, Society of Separationists indicates that absolute neutrality may mean that the City cannot discriminate based on an individual's belief system. This notion of neutrality is applied by the court in the context of concluding that all groups who want to use City facilities must

have equal access. However, equal use of City facilities may not amount to an equal opportunity to provide disparaging remarks during the opening portion of the City Council meeting. The City emphasizes this point, claiming that Society of Separationists endorsed "generic" statements made at the opening ceremony and did not encourage proselytizing. Snyder, on the other hand, claims that if only generic statements are allowed, the concept of prayer becomes essentially void. This Court agrees with Mr. Snyder on this premise.

Society of Separationists stands for the proposition that the concept of government neutrality also includes equal access to all. The Court specifically found that the Salt Lake City Council had not favored one religion or religion in general, and the Salt Lake City Council made efforts to assure a broad cross-section of the community was represented. These efforts were in compliance with the City Council's resolution which provides in part that the opening ceremony will (1) provide a moment during which Council members and the audience can reflect on the importance of the business before the Council; (2) recognize cultural diversity; and (3) foster sensitivity for and recognize the uniqueness of all segments of our community. At the time Snyder brought his suit no such formal policy existed in Murray City.

Snyder contends that the City created a protected interest when it scheduled the opening ceremony as a public forum for religious expression and that the City deprived Snyder of interests guaranteed by specific constitutional provisions. It is difficult to discern whether Snyder presents a procedural due process or a substantive due process claim, and any analysis of the due process right is dependent upon the free exercise and establishment clause claims discussed above.

Mr. Snyder's statement is not a prayer. His statement was clearly non-religious. The statement further is proselytizing, in that its purpose is to encourage others to criticize Murray City's policy. Society of Separationists requires non-religious claims be given equal time with religious claims in ceremonies such as the ones in question. However, the nature of Snyder's statement was clearly not contemplated by the Murray City Council in establishing its policy, and Mr. Snyder was offered the opportunity to speak during the later portion of the meeting more appropriate for political statements.

Snyder's Motion for Summary Judgment is denied. Murray City Corporation's Motion for Summary Judgment is granted.

Dated this 9 day of February, 2001.

/s/
STEPHEN L. HENRIOD
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 9 day of February, 2001:

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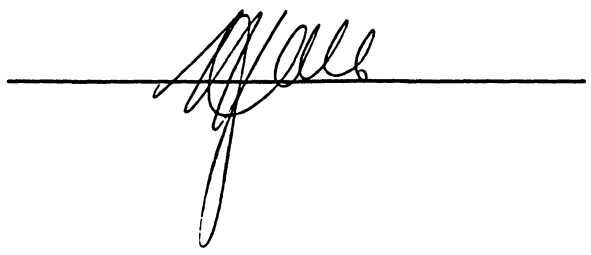

XIV. CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2001, I caused two true and correct copies of the *Errata* Brief of Appellees to be served by U.S. First Class Mail, postage prepaid, upon the following:

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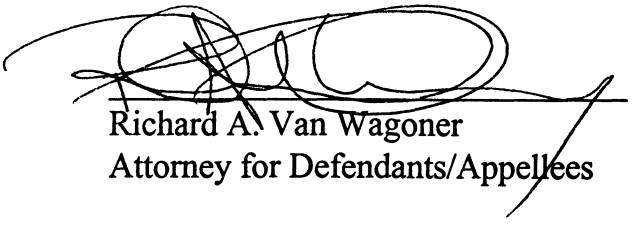

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